Supreme Court, U.S.
FILED
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No. 01-1325

In the Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, *et al.*, *Petitioners*,

v.

LEGAL FOUNDATION OF WASHINGTON, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed: March 7, 2002
Certiorari Granted: June 10, 2002

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United States District Court
U.S. District Court -- Western Washington (Seattle)

DOCKET FOR CASE #: 97-CV-146

WASHINGTON LEGAL FOUNDATION, et al.

v.

LEGAL FOUNDATION OF WASHINGTON, et al.

SELECTED DISTRICT COURT DOCKET ENTRIES

1/29/97	1	COMPLAINT (Summons(es) issued) Receipt # 238311 (pm) [Entry date 01/31/97]
2/7/97	4	AMENDED COMPLAINT [1-1] by plaintiff WA Legal Foundation, plaintiff Allen D Brown, plaintiff Dennis H Daugs, plaintiff Greg Hayes, plaintiff L Dian Maxwell; terminating Pla Mark Goldberg (jg) [Entry date 02/11/97]
2/20/97	8	MINUTE ORDER: by Judge Thomas S. Zilly. Honorable Thomas S Zilly RECUSES himself & the case is REASSIGNED to Honorable William L Dwyer. All future pleadings shall be filed under cause number C97-146WD.(cc: counsel, Judge, WLD, E.S., M.R., C.C.) (jg) [Entry date 02/21/97]
2/25/97	12	MINUTE ORDER: by Judge William L. Dwyer Case reassigned to Judge John C.

Coughenour (cc: counsel, Judges, JPM, Intake) (ws) [Edit date 02/25/97]

3/3/97 13 ANSWER to complaint [4-1] by defendant Legal Foundation WA, defendant Kevin F Kelly (gm) [Entry date 03/05/97]

3/10/97 19 ANSWER to amended complaint [4-1] by Supreme Court defts (gm) [Entry date 03/13/97]

5/15/97 28 STIPULATION for Dismissal of deft Justice Richard B. Sanders (gm) [Entry date 05/20/97]

5/19/97 27 STIPULATION and ORDER by Judge John C. Coughenour: dismissing defendant Richard B Sanders w/prejudice (cc: counsel, Judge) (rs)

5/22/97 29 MINUTES/STATUS CONFERENCE: JCC; Dep Clerk: J. Mahnke; CR: Joe Roth; Cnsl present: James Purcell/ Richard Samp/ Maureen Hart/William Gellert. Status Conference called, cnsl advise the Court of status. Opening motions are to be filed by 10/1/97. Cnsl are to file aresponsive briefs in accordance w/ the Local Rules. File Review set for 11/13/97. (gm) [Entry date 05/23/97]

11/5/97 38 MOTION by defendant Philip A Talmadge, defendant Charles Z Smith, defendant Barbara A Madsen, defendant Charles W

Johnson, defendant Richard P Guy, defendant James M Dolliver, defendant Gerry L Alexander, defendant Barbara Durham for summary judgment; OA REQ'D NOTED FOR 11/28/97 (gm)

11/5/97 41 MOTION by plaintiff L Dian Maxwell, plaintiff Greg Hayes, plaintiff Dennis H Daugs, plaintiff Allen D Brown, plaintiff WA Legal Foundation for summary judgment; OA REQ'D NOTED FOR 11/28/97 (gm)

11/5/97 53 MOTION by defendant Legal Foundation WA for summary judgment; OA REQ'D NOTED FOR 12/5/97 (gm) [Entry date 11/06/97]

12/1/97 58 RESPONSE by plaintiff to defts LFofW and Kelly's motion for summary judgment [53-1] (gm)

12/1/97 59 RESPONSE by plaintiffs to Supreme Court of WA's motion for summary judgment [38-1] (gm)

12/1/97 60 BRIEF OF Supreme Court Opposing Pltfs Motion for Summary Judgment motion [41-1] (gm) [Entry date 12/02/97]

12/1/97 62 OPPOSITION (RESPONSE by defendant Legal Foundation WA to motion for summary judgment [41-1] (gm) [Entry date 12/02/97]

12/4/97 64 REPLY by plaintiffs TO RESPONSE to motion for summary judgment; OA REQ'D [41-1] (kerr)

12/4/97 65 REPLY BRIEF by defendants IN SUPPORT of Supreme Court of Washington's motion for summary judgment [38-1] (gm) [Entry date 12/08/97]

12/4/97 66 REPLY MEMORANDUM by defendant Kevin F Kelly, defendant Legal Foundation WA IN SUPPORT OF motion for summary judgment [53-1] (gm) [Entry date 12/08/97]

1/30/98 70 ORDER by Judge John C. Coughenour: LFW Defts motion for summary judgment and the Supreme Court of WA's motion for summary judgment are GRANTED. Pltfs motion for summary judgment is DENIED. [41-1], [38-1], [53-1] (cc: counsel, Judge) (gm)

1/30/98 71 MINUTES: Oral Argument: JCC; Dep Clerk: J. Mahnke; CR: Joe Roth;Cnsl present: Richard Samp/David Burman/ Maureen Hart. Called, cnsl heard. The Court will issue a written decision. (gm)

1/30/98 72 JUDGMENT: DECISION BY THE COURT: IT IS ORDERED AND ADJUGED LFW Defendants Motion for Summary Judgment and the Supreme Court of Washington's Motion for Summary Judgment are GRANTED. Plaintiffs Motin

for Summary Judgment is DENIED. (cc: all counsel, JCC.Jgmbk) Judge, Jgm. Book) Entered on: 1/30/98 (gm)

2/7/98 73 NOTICE OF APPEAL by plaintiffs Greg Hayes, Dennis H Daugs, Allen D Brown, WA Legal Foundation from Dist. Court decision [72-1] (cc: CCA, Judge, counsel) (ss) [Entry date 02/11/98]

4/6/98 -- CERTIFICATE OF RECORD Transmitted to USCA [98-35154] (cc: all counsel) (ss) [Entry date 04/07/98]

12/28/99 -- CLERK'S RECORD ON APPEAL transmitted to Circuit (2 volumes) (kn)

12/10/01 80 MANDATE (98=35154) from Circuit Court of Appeals AFFIRMING IN PART, VACATING IN PART, and REMANDING IN PART the decision of the District Court, each party shall bear its own costs of appeal. [73-1] (cc: all counsel, JCC, jgm bk) (sa)

6/19/02 84 ORDER REMOVING CASE FROM ACTIVE CASELOAD by Chief Judge John C. Coughenour (cc: counsel, Judge, JM) (mh) [Entry date 06/21/02]

US Court of Appeals for the Ninth Circuit
Court of Appeals Docket #: 98-35154

WASHINGTON LEGAL FOUNDATION, et al.

v.

LEGAL FOUNDATION OF WASHINGTON, et al.

SELECTED COURT OF APPEALS DOCKET ENTRIES

2/18/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 2/25/98; appellant's designation of RT is due 2/17/98; appellee's designation of RT is due 2/27/98; appellant shall order transcript by 3/9/98; court reporter shall file transcript in DC by 4/9/98; certificate of record shall be filed by 4/16/98; appellant's opening brief is due 5/26/98; appellees' brief is due 6/25/98; appellants' reply brief is due 7/9/98; [98-35154] (mhf)
2/23/98	Filed atty Richard A. Samp for Appellants Washington Legal et al. Civil Appeals Docketing Statement served on 2/18/98 (to CONFATT) [98-35154] [98-35154] (sa)
4/8/98	Filed order CONFATT (CG) Case selected for Pre-Briefing Conference program. The

	briefing sched previously established is vacated. Appellants' brief, excerpts of record are due 7/29/98; appellees' brief due 8/28/98; appellants' reply brief due w/in 14 days of service of aples brief; The conf set for 4/21/98 is cancelled. [98-35154] (jmk)
4/14/98	Filed certificate of record on appeal RT filed in DC 4/1/98 [98-35154] (sa)
7/1/98	Filed order CONFATT (cg) releasing case from CONFATT; prev briefing schedule remains in effect... the clk may consider the prev modification of brf sched to be aplts' first ext of time which would preclude an oral req for ext of time... [98-35154] (sa)
8/4/98	Filed original and 15 copies Appellants' Washington Legal, Allen D. Brown, Dennis H. Daugs, Greg Hayes, and L. Dian Maxwell opening brief (Informal: no) 51 pages and five excerpts of record in 01 volume, served on 7/29/98 [98-35154] (ot)
9/11/98	Filed original and 15 copies amici Alaska Bar Found'n, Arizona Bar Found'n, Hawaii Justice, Montana Law Found., Nevada Law Found., and Oregon Law Found.'s amicus brief of 15 pages (w/ consents) in spt of aples; served on 9/11/98 [98-35154] (sa)
9/14/98	Filed original and 15 copies appellees Barbara Durham, et al. (Justices of the State of Washington Supreme Court) 26 page

brief, five sets Supp. Exc. in one volume; served on 9/10/98 [98-35154] (sa)

9/14/98 Filed original and 15 copies American Bar Assn.'s amicus brief of 45 pages (w/ consents); served on 9/11/98 [98-35154] (sa)

9/14/98 Filed original and 15 copies Natl Assoc of IOLTA's brief of 30 pages (w/ consents) in spt of aples; served on 9/10/98 [98-35154] (sa)

9/14/98 Filed original and 15 copies WA State Bar Assoc.'s amicus brief of 23 pages (w/ consents) in spt of aples; served on 9/11/98 [98-35154] (sa)

9/15/98 Filed original and 15 copies appellee Legal Foundation of Washington and Bradley C. Diggs' 51 page answering brief; served on 9/11/98 [98-35154] (sa)

10/19/98 Filed original and 15 copies Washington Legal, Allen D. Brown, Dennis H. Daugs, Greg Hayes and L. Dian Maxwell's reply brief, (Informal: n) 39 pages; served on 10/13/98 [98-35154] (sm)

12/7/99 CALENDARED: Seattle Feb 9 2000 9:00 a.m. Courtroom at Park Place, 21st Floor [98-35154] (th)

12/28/99 FILED CERTIFIED RECORD ON

APPEAL IN 2 VOLS.(TOTAL): 2 CLERKS REC (Orig) [98-35154] (jmk)

2/9/00 ARGUED AND SUBMITTED TO Stephen S. TROTT, Andrew J. KLEINFELD, Barry G. SILVERMAN [98-35154] (jmk)

1/10/01 FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen S. TROTT; Andrew J. KLEINFELD, author; Barry G. SILVERMAN.) FILED AND ENTERED JUDGMENT. [98-35154] (crw)

1/31/01 [4086291] Filed original and 50 copies Aples petition for rehearing with suggestion for rehearing en banc 15 pages, served on 1/30/01 PANEL AND ALL ACTIVE JUDGES [98-35154] (crw)

2/12/01 Filed order (Stephen S. TROTT, Andrew J. KLEINFELD, Barry G. SILVERMAN): Aplts are ordered to file a response to aples petn for rhrg/en banc filed with this court on 1/31/01. The resp shall not exceed 15 pages and shall be filed within 21 days of the date of this order. 50 copies of the resp should be filed with the ct. [98-35154] (crw)

3/5/01 Filed Aplts response to petition opposing petition for enbanc rehearing [4086291-1] served on 3/2/01 PANEL AND ALL

ACTIVE JUDGES [98-35154] (crw)

5/9/01 Filed for publication order (Mary M. SCHROEDER): Upon the vote of a majority of nonrecused regular active judges of this court, it is orderd that this case be reheard by the en banc court pursuant to CR 35-3. The three-judge panel opn shall not be cited as precedent by or to this court or any dc of the 9th Cir, except to the extent adopted by the en banc court. [98-35154] (crw)

5/10/01 Filed order (Mary M. SCHROEDER): Oral arg in the above case shall be reheard en banc in SF on 6/21/01 at 2pm. [98-35154] (crw)

5/10/01 CALENDARED: SAN FRAN Jun 21 2001 2:00 pm Courtroom 4 [98-35154] (aw)

6/21/01 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Harry PREGERSON, Alex KOZINSKI, Stephen S. TROTT, Andrew J. Kleinfeld, A. W. TASHIMA, Barry G. SILVERMAN, Kim M. WARDLAW, Raymond C. FISHER, Marsha S. BERZON, Johnnie B. RAWLINSON [98-35154] (tu)

11/14/01 FILED OPINION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED. Each party shall bear its own costs of appeal. (Terminated on the Merits after

Oral Hearing; Affirmed; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Harry PREGERSON; Alex KOZINSKI, dissenting; Stephen S. TROTT, dissenting; Andrew J. KLEINFELD, dissenting; A. W. TASHIMA; Barry G. SILVERMAN, dissenting; Kim M. WARDLAW, author; Raymond C. FISHER; Marsha S. BERZON; Johnnie B. RAWLINSON.) FILED AND ENTERED JUDGMENT. [98-35154] (crw)

12/6/01 MANDATE ISSUED [98-35154] (crw)

3/18/02 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 01-1325 filed on 3/7/02. [98-35154] (crw)

6/14/02 Filed Supreme Court order, certiorari denied on 6/10/02. Supreme Court No. 01-1325 [98-35154] (crw)

United States District Court
for the Western District of Washington

Washington Legal Found. v. Legal Found. of WA
No. 97-CV-146

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action by a public interest law firm and four citizens of the State of Washington to enjoin state officials from continuing to require Limited Practice Officers ("LPOs") to deposit trust funds into Washington's IOLTA ("Interest on Lawyers' Trust Accounts") program.

2. Under the IOLTA program, Washington officials compel both LPOs and attorneys under certain circumstances to forward to a state-controlled entity interest earned on funds being held in trust for their clients.

3. Each of the Plaintiffs objects to this compelled taking and use of IOLTA trust accounts, in violation of their rights under the U.S. Constitution as guaranteed by the First and Fifth Amendments.

Jurisdiction

4. The Court has jurisdiction over this action under 28 U.S.C. § 1331, in that the action arises under the Constitution of the United States; and under 28 U.S.C. § 1343, in that the action seeks redress of the deprivation, under color of state law, of rights secured by the Constitution. Plaintiffs' rights to judicial review of the actions complained of are secured by 42 U.S.C. § 1983.

Parties

5. Plaintiff WASHINGTON LEGAL FOUNDATION (WLF) is a nonprofit public interest law and policy center with members and supporters nationwide, including many within the State of Washington. It devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference. Among WLF's members are citizens of Washington who object to having their money used to support the Washington IOLTA program, and LPOs in Washington who object to being forced to place client trust funds into IOLTA accounts.

6. Plaintiff ALLEN D. BROWN is a citizen of Washington. In the course of his business dealings, BROWN has regularly purchased and sold real estate located in the State of Washington, and he expects to continue to do so. A standard procedure in Washington real estate transactions entails the purchaser, pursuant to a purchase and sale agreement and prior to closing, placing funds in trust with a closing agent hired by the parties to facilitate the sale; the agent holds the trust funds until the sale transaction is closed. BROWN has regularly deposited trust funds with closing agents in the past, and he expects to continue to do so. BROWN has been informed by the agents with whom he regularly deals that, pursuant to changes in the IOLTA program adopted by the Washington Supreme Court in September 1995, they are required to place his trust funds into an IOLTA account.

7. GREG HAYES is a citizen of Washington. In the course of his business dealings, HAYES has purchased real estate located in the State of Washington, and he expects to continue to do so. In connection with those real estate transactions, HAYES has deposited trust funds with closing

agents in the past, and he expects to continue to do so. HAYES has been informed by the agents with whom he deals that, pursuant to changes in the IOLTA program adopted by the Washington Supreme Court in September 1995, they are required to place his trust funds into an IOLTA account.

8. L. DIAN MAXWELL is a citizen of Washington. She is employed by Pacific Northwest Title Company of Washington, Inc. ("PNW Title," formerly known as Stewart Title Company of Washington, Inc.), a company that provides escrow services to buyers and sellers in connection with real estate transactions. Incidental to her job responsibilities, MAXWELL has selected and filled in blanks of pre-approved form legal documents necessary to effectuate the transfer of title to real estate from a seller to a purchaser; MAXWELL has been authorized to select and fill in such documents by virtue of being licensed as an LPO by the Washington Supreme Court. Although the selection and filling in of form legal documents is a necessary component of the real estate closing process, those activities in fact constitute a negligible portion of the time that MAXWELL has spent on behalf of her escrow customers. She estimates that no more than 1 to 2 percent of her time has been devoted to those activities.

9. Pursuant to changes in the IOLTA program adopted by the Washington Supreme Court in September 1995, in any real estate transaction in which an LPO performs services, the LPO must ensure that funds placed in trust in connection with the transaction are deposited in an IOLTA account. MAXWELL was recently informed by PNW Title that it did not wish to subject itself to the September 1995 change in the IOLTA program because it believed that doing so would be contrary to the best interests of its customers. Thus, PNW Title informed MAXWELL that, if she wished to continue to

be employed by PNW Title, she would be required to surrender her license as an LPO. Recognizing that there were extremely few positions comparable to hers within the escrow industry, MAXWELL responded by surrendering her LPO license on November 27, 1996. As a result, MAXWELL is no longer permitted to practice her profession fully, and to select and fill in the legal documents that she is fully qualified to select and fill in.

10. Plaintiff DENNIS H. DAUGS is a citizen of Washington. DAUGS's business entails providing escrow services to buyers and sellers in connection with real estate transactions. Incidental to the service provided to his clients, DAUGS has selected and filled in the blanks of form legal documents necessary to effectuate the transfer of title of real estate from a seller to a purchaser; DAUGS is authorized to select and fill in such documents by virtue of being licensed as an LPO by the Washington Supreme Court. Although the selection and filling in of form legal documents is a necessary component of the real estate closing process, those activities in fact constitute a negligible portion of the time that DAUGS has spent on behalf of his escrow customers. He estimates that no more than 1 to 2 percent of his time has been devoted to those activities.

11. DAUGS has concluded that, although the Washington Supreme Court's revised IOLTA rules require that client trust funds held by him be deposited in an IOLTA account, doing so would be contrary to the best interests of his clients. DAUGS is suing on behalf of himself and in his fiduciary capacity as trustee on behalf of his clients whose funds, according to the revised IOLTA rules, must be placed into an IOLTA account.

12. Defendant LEGAL FOUNDATION of WASHINGTON (LFofW) is a nonprofit corporation

established under the direction of the Washington Supreme Court. Pursuant to rules established by the Washington Supreme Court, all interest earned on IOLTA accounts is forwarded to LFofW, which in turn distributes the funds to other entities in accordance with rules established by the Supreme Court of Washington.

13. Defendant KEVIN F. KELLY is President of LFofW. KELLY is being sued in his official capacity.

14. Defendant BARBARA DURHAM is Chief Justice of the Washington Supreme Court, the government body at whose direction the Washington IOLTA program was established. DURHAM is being sued in her official capacity.

15. Defendant GERRY L. ALEXANDER is a Justice of the Washington Supreme Court. ALEXANDER is being sued in his official capacity.

16. Defendant JAMES M. DOLLIVER is a Justice of the Washington Supreme Court. DOLLIVER is being sued in his official capacity.

17. Defendant RICHARD P. GUY is a Justice of the Washington Supreme Court. GUY is being sued in his official capacity.

18. Defendant CHARLES W. JOHNSON is a Justice of the Washington Supreme Court. JOHNSON is being sued in his official capacity.

19. Defendant BARBARA A. MADSEN is a Justice of the Washington Supreme Court. MADSEN is being sued in her official capacity.

20. Defendant RICHARD B. SANDERS is a Justice of the Washington Supreme Court. SANDERS is being sued in his official capacity.

21. Defendant CHARLES Z. SMITH is a Justice of the Washington Supreme Court. SMITH is being sued in his official capacity.

22. Defendant PHILIP A. TALMADGE is a Justice of the Washington Supreme Court. TALMADGE is being sued in his official capacity.

Statement of the Claim
Creation of the IOLTA Program

23. On June 19, 1984, the Washington Supreme Court adopted an order establishing the Washington Interest on Lawyers Trust Accounts program (the "IOLTA Program"). Pursuant to that order, the Court incorporated and established a nonprofit corporation known as the LEGAL FOUNDATION of WASHINGTON, with Articles of Incorporation and Bylaws promulgated by the Court.

24. The order also amended Disciplinary Rule ("DR") 9-102 of the Washington Code of Professional Responsibility ("CPR"), which imposed obligations on Washington attorneys regarding "Preserving Identity of Funds and Property of a Client." The amendment provided that an attorney receiving client funds that were "nominal in amount" or were "expected to be held for a short period of time" must create an unsegregated interest- bearing trust account (an "IOLTA account") and direct the depository institution to pay interest earned on the account to the LFofW. CPR DR 9-102(C)(1) and (4). The amendment further provided that all client funds were to be placed into the IOLTA account unless they were deposited in another interest-bearing account that resulted in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). DR 9-102(C)(3).

25. Pursuant to the Washington Supreme Court's order as amended, the IOLTA Program became effective March 1, 1985.

26. The Washington Supreme Court subsequently repealed the Code of Professional Responsibility and replaced it with the Rules of Professional Conduct ("RPC"), a similar set of rules designed to regulate the conduct of Washington attorneys. The provisions of CPR DR 9-102 were incorporated into RPC 1.14. A copy of the most recent version of RPC 1.14 is attached hereto as Exhibit A.

27. Prior to adoption of the IOLTA Program, Washington banks and other financial institutions (hereinafter, "banks") generally did not pay interest on trust accounts maintained by attorneys and others. However, they did provide a variety of accounting services free of charge, and those services directly benefited those whose funds were being held in the trust accounts.

28. Following adoption of the IOLTA Program, many banks began charging for such accounting services, and deducting the cost of those services from the interest earned on IOLTA accounts prior to forwarding interest to the LFofW.

29. In response to a request by the LFofW, the Washington Supreme Court in 1988 and 1989 amended RPC 1.14 to make clear that banks would no longer be permitted to deduct the cost of accounting services from the interest on IOLTA accounts otherwise payable to the LFofW. As amended, RPC 1.14 limits bank charges on IOLTA accounts to the following: "items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge." RPC 1.14(c)(1).

30. At present, Washington banks generally do not provide accounting services free of charge on IOLTA accounts.

Limited Practice Officers

31. Both before and after 1983, many real estate transactions in Washington have been consummated without the assistance of attorneys. In those cases, legal documents used to complete the transactions have been selected by trained laypersons familiar with the legal requirements of such transactions.

32. In the past and again in the early 1980s, a controversy arose regarding whether such laypersons were engaged in the unauthorized practice of law.

33. The Washington Supreme Court attempted to settle that controversy in 1983 by adopting Admission to Practice Rule ("APR") 12. APR 12 established a procedure whereby nonlawyers could be licensed to select appropriate legal documents for use in real estate settlements. APR 12 established a Limited Practice Board with the responsibility for licensing such LPOs (Limited Practice Officers, also known as Certified Closing Officers).

34. In June 1993, the Board of Governors of the Washington State Bar Association ("WSBA"), at the request of the WSBA Legal Aid Committee and with the support of the LFofW, petitioned the Washington Supreme Court to amend APR 12 to require that trust funds held by LPOs be made a part of the IOLTA Program. The Court conducted oral arguments on the petition on September 20, 1994.

35. Proponents of the amendment explicitly argued that the amendment was necessary in order to "level the playing field" between escrow attorneys and escrow companies that operated without attorneys; they argued that escrow companies were able to offer lower-priced services because (unlike escrow attorneys) escrow companies were able to obtain free accounting services from banks in return for using non-interest-bearing trust accounts. *See, e.g.*, LFofW's Brief to Washington Supreme Court dated February 1, 1994, at 36.

36. On September 21, 1995, the Washington Supreme Court adopted a new APR 12(h) and 12.1 in order to make LPOs subject to the IOLTA Program. APR 12(h) and 12.1 make clear that LPOs' obligations to maintain and use IOLTA accounts are identical to attorneys' IOLTA obligations. Copies of APR 12(h) and 12.1 are attached hereto as Exhibit B.

37. APR 12(h) provides that LPOs must comply with APR 12.1. APR 12.1 in turn provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account. The interest-bearing account must be an IOLTA account (with interest payable to the LFofW), except that the funds may be placed in a non-IOLTA interest-bearing account if and only if doing so results in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). APR 12.1(c)(2) and (3). In determining the net interest to be forwarded to the LFofW from IOLTA accounts established by LPOs, banks may deduct from gross interest the following charges only: items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge. APR 12.1(c)(1).

38. APR 12.1 and APR 12(h) became effective December 9, 1995. However, confusion regarding the meaning of the new requirements delayed considerably compliance with the new rule by the escrow industry. Opponents of the new rule pointed out that LPOs often do not control escrow funds being held in connection with the transaction they are closing, and that state regulations governing the escrow industry required that trust funds be held in non-interest-bearing accounts. *See* WAC 308-128E-011(1). The Washington State Department of Financial Institutions responded by adopting a new regulation on

November 17, 1996 that explicitly permitted use of interest-bearing accounts. *See* WAC 208-680E-011(1)(c).

39. Justice SANDERS, who had become a member of the Washington Supreme Court after its September 1995 adoption of APR 12(h) and APR 12.1, wrote a letter dated March 13, 1996 to members of the escrow industry, indicating that the Court was reconsidering its earlier decision and asking for responses to a variety of questions regarding the duties of LPOs. Numerous comments were received by the Court during April and May 1996 regarding the new rules, both pro and con.

40. Justice SANDERS indicated in subsequent correspondence that the Court had voted on May 8, 1996 not to repeal APR 12(h) and APR 12.1, with Justice SANDERS and one other Justice voting for repeal.

41. Apparently believing that the escrow industry was taking insufficient steps to comply voluntarily with APR 12.1, the Limited Practice Board (the "Board") in mid-1996 submitted to the Washington Supreme Court proposed changes in its rules and regulations for admission and discipline. The Court accepted comments on the proposed changes until October 11, 1996, and is now considering whether to approve the changes. Among the proposed changes -- virtually all apparently designed to compel compliance with APR 12.1 by LPOs -- are: a rule requiring LPOs annually to complete questionnaires designed to determine whether they are complying with APR 12.1 (Disciplinary Rule ("DR") 11.4), a rule permitting the Board to examine the books and records of any LPO (or of a closing firm, if an LPO participated in its closings) suspected of noncompliance with APR 12.1, or the books and records of *any* randomly selected LPO or affiliated closing firm (DR 11.1), a rule permitting the Board to examine "without

notice" all documents selected, prepared, and completed by authority of APR 12 (Rule 10.1), a rule providing absolute immunity from suit to anyone providing information to the Board (DR 9.1(B)), a rule permitting the Board to impose financial sanctions against those found to have violated the Board's rules (DR 1.10), and a rule extending the Board's jurisdiction to include disciplinary authority against LPOs even after they have resigned their commissions (DR 1.2).

Operation of the IOLTA Program

42. Since its inception in 1985, interest generated by IOLTA accounts and forwarded to the LFofW has generally amounted to between $2.5 million and $4.0 million per year. IOLTA income reached $4.0 million in 1990 and subsequently dropped off somewhat due to declining interest rates. IOLTA income for 1995 was $2.7 million.

43. According to the WSBA, expansion of the IOLTA Program to include trust accounts in transactions closed by LPOs was justified because: (1) LPOs and attorneys should be subject to similar rules because they perform similar functions; and (2) the decline in post-1990 IOLTA income had helped to create "a crisis in our system of civil justice" in which 3/4 of low-income persons "cannot get the legal advice or representation they need about their most basic legal services."

44. LFofW has extremely broad discretion regarding the use of its income. LFofW is authorized under its Articles of Incorporation to award grants to § 501(c)(3) nonprofit corporations for the purpose of providing legal services and education to the public in civil law matters.

45. Throughout its history, LFofW has awarded the great majority of its grant funds to Columbia Legal Services

("Columbia") and Columbia's three predecessors-in-interest: Evergreen Legal Services ("Evergreen"), Puget Sound Legal Services ("Puget Sound"), and Spokane Legal Services ("Spokane"). For example, in 1995, more than $2.5 million of LFofW's $3.1 million in grant awards went to Columbia.

46. Columbia and its predecessors have used their IOLTA grant funds to support litigation and other causes to which some citizens of Washington object for political or ideological reasons. As just one example, after Seattle adopted an ordinance banning aggressive panhandling, Evergreen filed a facial challenge to the ordinance, alleging that the ordinance's prohibition against sitting or lying on public sidewalks in commercial areas chilled beggars' First Amendment rights to free expression. The U.S. Court of Appeals for the Ninth Circuit recently affirmed a decision dismissing the suit. *Roulette v. City of Seattle,* 78 F.3d 1425 (9th Cir. 1996). Columbia's motion for rehearing was subsequently denied. 97 F.3d 300 (9th Cir. 1996).

47. The political nature of Columbia's legal work is confirmed by its recent reorganization. Historically, much of the funding for local legal services organizations such as Evergreen, Puget Sound, and Spokane came from the federal Legal Services Corporation ("LSC"). Concerned that local legal services organizations were using funds for purposes it deemed inappropriate, Congress in 1996 enacted legislation that prohibited LSC fund recipients from engaging in certain types of litigation -- including class action litigation and litigation on behalf of undocumented aliens. Evergreen, Puget Sound, and Spokane did not wish to be bound by those restrictions. Accordingly, they merged as of December 31, 1995 to form Columbia and announced that Columbia would not accept LSC funds. Simultaneously, they facilitated the creation of Northwest Justice Project, which does accept LSC

funds and provides many of the less controversial legal services formerly provided by Evergreen, Puget Sound, and Spokane. Northwest Justice Project shares office space with Columbia throughout Washington and, in some cases, shares personnel.

48. LFofW -- in order to facilitate the efforts of Columbia to provide the types of legal services deemed too controversial by Congress -- awards the bulk of its IOLTA grants to Columbia and none to Northwest Justice Project.

49. Other recent recipients of IOLTA grant awards whose IOLTA-funded activities are political and/or ideological in nature include the Northwest Immigrants Rights Project and the Northwest Communities Education Center (which have assisted undocumented aliens seeking to avoid deportation), the Fremont Public Association (which has lobbied and sued various government entities on behalf of clients seeking higher welfare benefits), and the National Lawyers Guild.

The Plaintiffs' Dealings with IOLTA

50. As noted in Paragraphs 6-7, Plaintiffs BROWN and HAYES regularly purchase and sell real estate as part of their business dealings. Such transactions have occurred since the December 1995 effective date of APR 12(h) and 12.1 and are highly likely to continue. As part of such transactions, agents acting on behalf of BROWN and HAYES routinely hold in trust funds belonging to them pending completion of the transactions.

51. Plaintiffs BROWN and HAYES have every reason to believe that the agents holding such trust funds have, since December 1995, placed the trust funds into IOLTA accounts and/or will place such trust funds into IOLTA accounts --

because virtually all of the agents employed by BROWN and HAYES make use of the services of LPOs in selecting appropriate legal documents, and because APR 12.1 has been applicable since December 1995 to all real estate transactions closed with the assistance of an LPO.

52. Plaintiffs BROWN and HAYES have informed LPOs with whom they transact business that they do not wish their trust funds placed into IOLTA accounts. Those LPOs have responded that they are bound by APR 12(h) and 12.1 and that, under the terms of those rules, their only practical option is to place trust funds into an IOLTA account.

53. Because Washington banks generally are unwilling to provide free accounting services on interest-bearing checking accounts, Plaintiffs BROWN and HAYES do not receive the benefit of such services when their escrow agents are required to place trust funds into interest-bearing IOLTA accounts.

54. Plaintiffs BROWN and HAYES object to some of the uses to which recipients of LFofW grants (the "Recipient Organizations") are putting IOLTA grant funds and thus object to being forced to associate with the Recipient Organizations by having the interest generated from their trust funds used to finance the Recipient Organizations.

55. Any interest income derived from Plaintiffs BROWN's and HAYES's funds rightfully belong to them. They object to anyone other than themselves receiving the interest derived from those funds.

56. Plaintiff MAXWELL has been trained and licensed as an LPO but is now unable to practice her profession because of the adoption of APR 12(h) and 12.1. Because her employer, PNW Title, correctly determined that compliance with APR 12(h) and 12.1 would entail violation of its fiduciary obligation to its clients and would result in a

violation of their constitutional rights, MAXWELL was forced to abandon her chosen profession in order to maintain her employment with PNW Title.

57. Even had MAXWELL decided to resign from PNW Title and form her own escrow company in order to continue as an LPO, she could not have complied with APR 12(h) and 12.1 without violating her fiduciary obligation to act in the best financial interest of her clients. MAXWELL has been told by some clients that they do not wish to be associated with the LFofW and the Recipient Organizations, and do not wish their funds to be used to generate interest for the IOLTA program. As an experienced professional involved with the escrow industry, MAXWELL believes that the escrow industry cannot provide the same services at the same price to its clients if the industry itself must begin paying for the accounting services that formerly were provided free-of-charge by the banking industry.

58. Plaintiff DAUGS has been placed in an untenable position because of the adoption of APR 12(h) and 12.1. If he complies with APR 12(h) and 12.1 by placing client trust funds into an IOLTA account, he will violate his clients' rights under the First and Fifth Amendments to the U.S. Constitution, and will violate his fiduciary duty of loyalty to his clients (which requires him to act solely in the interest of and on behalf of his clients as to matters relating to the administration of the clients' funds). If he does not comply with APR 12(h) and 12.1, he risks disciplinary action by the Washington Supreme Court.

59. Plaintiff DAUGS objects to some of the uses to which Recipient Organizations are putting IOLTA grant money and thus objects to being forced to associate with the Recipient Organizations by depositing client trust funds into an IOLTA account. Plaintiff DAUGS further believes that

APR 12(h) and 12.1 prevent him from carrying out his fiduciary responsibilities to his clients by not permitting him to give his clients the option of designating that their trust funds not be placed into an IOLTA account.

60. Plaintiff WLF is a membership organization whose members include Washington citizens who -- like Plaintiffs BROWN and HAYES -- have had and/or are likely in the future to have funds placed into IOLTA accounts. Those members do not wish to be associated in that manner with LFofW and the Recipient Organizations and do not wish interest on their funds to go to anyone but themselves. Other WLF members include Washington LPOs who -- like Plaintiff DAUGS -- believe that they are being prevented from carrying out their fiduciary duties to their clients by not being permitted to give their clients the option of placing their trust funds into non-interest-bearing accounts. Other WLF members include recently-resigned LPOs who -- like Plaintiff MAXWELL -- have been forced to resign from their chosen profession in order to maintain employment with an employer who believes that compliance with APR 12(h) and 12.1 would violate its fiduciary duties to its clients.

61. On August 21, 1992, WLF filed a petition with the Supreme Court of Washington that, *inter alia,* asked the Court to prohibit the deposit of funds into an IOLTA account unless the owner of those funds provided his or her informed consent to such deposit. The Court did not respond to WLF's petition.

COUNT I
(First Amendment)

62. Plaintiffs incorporate herein by reference the allegations of Paragraphs 1 through 61.

63. The forced collection and use, under color of state law, of interest generated from funds belonging to Plaintiffs BROWN and/or HAYES, and/or belonging to similarly situated members of Plaintiff WLF, despite their objections to some of the uses to which that interest is put, deprive Plaintiffs BROWN and HAYES, and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment of the U.S. Constitution.

64. The forced collection and use, under color of state law, of interest generated from trust funds being held by Plaintiff DAUGS and/or being held in the trust accounts of similarly situated members of WLF, despite their objections to some of the uses to which that interest is being put, deprive Plaintiff DAUGS and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution.

65. Requiring Plaintiff MAXWELL and similarly situated members of WLF, under color of state law, to associate with the LFofW and the Recipient Organizations by requiring them -- as a condition of their continued licensure as LPOs -- to collect interest generated on trust funds they are handling on behalf of clients and to forward that interest to the LFofW, despite their objections to some of the uses to which that interest is put, deprive Plaintiff MAXWELL and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution.

COUNT II
(Fifth Amendment)

66. Plaintiffs incorporate herein by reference the allegations of Paragraphs 1 through 61.

67. The Fifth Amendment to the U.S. Constitution guarantees that private property shall not be taken for public use, without just compensation. The taking, under color of state law, of the interest earned on Plaintiffs BROWN's and HAYES's funds placed into IOLTA accounts -- and on funds of similarly-situated members of WLF placed into IOLTA accounts -- constitutes an illegal taking of property belonging to them, in violation of the Fifth Amendment to the U.S. Constitution.

68. The taking, under color of state law, of the interest earned on funds placed into an IOLTA account maintained in connection with any transaction closed by Plaintiffs MAXWELL and DAUGS -- and on funds placed into an IOLTA account of similarly situated WLF members -- constitutes an illegal taking of the property of the clients of Plaintiff MAXWELL and DAUGS and of similarly situated WLF members, in violation of the Fifth Amendment to the U.S. Constitution.

COUNT III
(Fifth Amendment)

69. Plaintiffs hereby incorporate by reference the allegations of Paragraphs 1 through 61.

70. Defendants' taking of the equitable or beneficial interest in (use of) client funds, under color of state law, by requiring their placement into IOLTA accounts, constitutes an illegal taking of the beneficial use of those funds, in violation of Plaintiffs' rights under the Fifth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs respectfully request the following relief:

(1) Enter judgment requiring Defendants LEGAL FOUNDATION of WASHINGTON and KELLY to refund the full amount of interest earned on Plaintiffs BROWN's and HAYES's money placed into IOLTA trust accounts, plus interest.

(2) Enter judgment declaring Admission to Practice Rules 12(h) and 12.1 void as an unconstitutional deprivation of Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, insofar as they *require* LPOs to place certain client funds into IOLTA trust accounts.

(3) Permanently enjoin the nine Defendants who are members of the Washington Supreme Court from taking any disciplinary action against LPOs who fail to comply with the requirements of Admission to Practice Rules 12(h) and 12.1; and from adopting any rules that purport to require LPOs, as a condition for practicing their profession in Washington, to handle client trust funds in a manner designed to ensure that interest on those funds will accrue to anyone not designated by the client.

(4) Award Plaintiffs the costs of this action, including attorney fees as provided for by 42 U.S.C. § 1988.

(5) Award such other relief as the Court may deem just.

Respectfully submitted,

s/
James J. Purcell
(WSBA #9180)
1218 3rd Ave., #2307
Seattle, WA 98101
(206) 622-5322

s/
Daniel J. Popeo

s/
Richard A. Samp
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: February 7, 1997 Counsel for Plaintiffs

ANSWER TO COMPLAINT OF DEFENDANTS LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT
March 3, 1997

Defendants Legal Foundation of Washington and its president Kevin F. Kelly (collectively, "LFW") answer the respective paragraphs of the Amended Complaint for Injunctive Relief ("Complaint") as follows:

1. This introductory paragraph contains no allegations and thus requires no response from LFW.

2. LFW admits that under the IOLTA program, enforced by Washington officials, LPOs and attorneys are required under certain circumstances to cause to be forwarded to the Legal Foundation of Washington the interest earned after fees and expenses on funds held in pooled trust accounts. To the extent this paragraph alleges anything other or broader than this, LFW denies the same.

3. LFW denies that any procedure involving LFW violates plaintiffs' rights under the First and Fifth Amendments to the United States Constitution.

4. LFW admits the first sentence and denies the second.

5. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same. LFW denies that the Washington Legal Foundation has standing on its own or on behalf of its members.

6. LFW admits the allegation contained in the third sentence of this paragraph. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

7. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

8. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

9. LFW denies that the changes to the IOLTA program adopted by the Washington Supreme Court in 1995 require an LPO to ensure that funds placed in trust in connection with "any" real estate transaction in which the LPO performs services be deposited in an "IOLTA account." Funds only need to be deposited in a pooled account under circumstances where the LPO could not establish a separate account for the client that would yield a positive net return to that client. LFW denies the last sentence. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

10. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

11. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in the first sentence of this paragraph, and it therefore denies the same. LFW denies that DAUGS has standing to sue on behalf of anyone else.

12. LFW admits, except that the Legal Foundation of Washington only receives interest earned after fees and expenses on pooled accounts.

13. LFW admits.

14. LFW admits.

15. LFW admits.

16. LFW admits.

17. LFW admits.
18. LFW admits.
19. LFW admits.
20. LFW admits.
21. LFW admits.
22. LFW admits.
23. LFW admits the first sentence. As to the second sentence, the Supreme Court's order did not directly incorporate and establish the Legal Foundation of Washington or promulgate its articles and bylaws, but rather it ordered the Washington Bar Association to do so by January 1, 1985.
24. LFW admits the first sentence. As to the remainder of the paragraph, the Disciplinary Rules of the Code of Professional Responsibility speak for themselves and must be read and interpreted in context. The Legal Foundation of Washington only receives interest earned after fees and expenses on pooled accounts.
25. LFW admits.
26. LFW admits.
27. LFW admits the first sentence as to pooled trust accounts. LFW denies the allegations in the second sentence to the extent they imply that banks always or regularly provided to clients, as opposed to their attorneys, special accounting services or that such services were "free of charge." LFW denies that any special accounting services that banks provided directly benefited those whose funds were being held in non-interest bearing trust accounts.
28. LFW admits that at least some banks began charging discrete fees for such special accounting services.
29. LFW admits that the Washington Supreme Court amended RPC 1.14. As to the remainder of the paragraph, the Rule speaks for itself and must be read and interpreted in context.

30. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same. Some accounting services are provided on any account.
31. LFW admits, without suggesting that such practices were legal.
32. LFW admits.
33. LFW denies the first sentence. As the remainder of the paragraph, the Rule speaks for itself and must be read and interpreted in context. The Washington Supreme Court did not attempt to settle the referenced legal controversy by adopting APR 12. Rather, that controversy was settled by the Court's decisions in Washington State Bar Ass'n v Great Western Union Federal Savings & Loan, 91 Wn.2d 48, 586 P.2d 870 (1978), and Bennion, Van Camp. Hagan & Ruhl v. Kassler Escrow. Inc., 96 Wn.2d 443, 635 P.2d 730 (1981), where the Court held such practices to be unauthorized practice of law.
34. LFW admits that when an LPO receives client funds in trust the LPO must handle them pursuant to APR I2 and RPC 1.14. The Rules speak for themselves and must be read and interpreted in context.
35. LFW's "arguments" and the "arguments" of other "proponents" speak for themselves and must be read and interpreted in context. LFW denies that escrow companies that operated without attorneys always or regularly shared any savings from special accounting services with their clients.
36. LFW admits that the Rules were adopted. The Rules speak for themselves and must be read and interpreted in context.
37. APR 12 speaks for itself and must be read and interpreted in context.

38. LFW admits the first sentence. The cited WAC provisions speak for themselves and must be read and interpreted in context. LFW admits that WAC 308-128E-011(1) generally prohibited interest-bearing accounts. LFW believes that at least some non-compliance was the result of willful disobedience. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

39. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

40. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

41. LFW admits, except as to the conjecture of the beliefs of the Limited Practice Board, but asserts that the proposed rules must be read and interpreted in context. LFW admits that voluntary compliance has been inadequate.

42. LFW admits, except that IOLTA revenue was below $2.5 million in some years, and the figure. for 1990 is $3.9 million.

43. The WSBA's position speaks for itself and must be read and interpreted in context.

44. LFW denies that its discretion is "extremely broad." LFW otherwise admits.

45. LFW lacks sufficient knowledge or information to enable it to admit or deny whether Columbia Legal Services is technically a successor-in-interest to Evergreen, Puget Sound, and Spokane Legal Services, and it therefore denies the same. LFW admits that a majority of its grant funds have gone to the listed entities.

46. LFW admits that Columbia, Evergreen, Puget Sound, and Spokane Legal Services have acted as legal counsel for their clients in the pursuit of litigation and other legal remedies. LFW admits that some citizens of Washington oppose or disagree with some claims made by some of these clients in some of these legal actions. LFW admits that some citizens might have political or ideological reasons for objecting to judicial resolution of these claims. LFW admits that Evergreen and other legal counsel represented plaintiffs in *Roulette v. City of Seattle*, and that the Ninth Circuit has affirmed the trial court's dismissal of that lawsuit and subsequently denied rehearing. To the extent this paragraph alleges or suggests anything other or broader than this, LFW denies the same.

47. LFW denies the first sentence, admits the second sentence, and lacks sufficient knowledge or information to enable it to admit or deny the remainder of the paragraph, and it therefore denies the same.

48. LFW denies.

49. LFW admits that the named entities have received funds from the Legal Foundation of Washington at one time or another. LFW denies the remaining allegations of this paragraph.

50. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

51. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

52. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

53. LFW denies that Washington banks ever provided "free" special accounting services or that the provision by banks of special accounting services to escrow agents would, generally or regularly benefit these plaintiffs or other clients of such agents.

54. LFW denies that BROWN and HAYES are forced to associate with the Recipient Organizations. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

55. LFW denies the first sentence of this paragraph. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

56. LFW denies that MAXWELL is unable to practice her profession because of the adoption of APR 12(h) and 12.1, and LFW denies that PNW Title was correct if it concluded that compliance with APR I 2(h) and 12. I would entail violation of PNW Title's fiduciary obligation to its clients and would result in a violation of their constitutional rights. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

57. LFW denies the allegations in the first sentence of this paragraph. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

58. LFW denies the allegations in the first and second sentences of this paragraph. LFW admits the allegation in the third sentence of this paragraph.

59. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

60. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

61. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

62. LFW incorporates by reference its responses to the referenced paragraphs of the complaint.

63. LFW denies.

64. LFW denies.

65. LFW denies.

66. LFW incorporates by reference its responses to the referenced paragraphs of the complaint.

67. LFW admits the allegation in the first sentence of this paragraph. LFW denies the remaining allegations in this paragraph.

68. LFW denies.

69. LFW incorporates by reference its responses to the referenced paragraphs of the complaint.

70. LFW denies.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim entitling them to relief.

2. Plaintiffs lack standing.

3. The Eleventh Amendment and the doctrine of sovereign immunity prevent the Court from awarding plaintiffs any monetary relief.

4. Any taking of plaintiffs' property is the result of private action (i.e., the unlawful conduct of LPOs in failing to invest client funds in an account for the benefit of the client when such an account could provide the client a positive net return).

5. Plaintiffs have never demanded the payment of interest on accounts of the type at issue here and have consented to their failure to receive interest.

6. Plaintiffs are not the real parties in interest.

7. The equitable relief sought by plaintiffs is precluded by such equitable doctrines as laches, waiver, and unclean hands.

PRAYER

WHEREFORE, LFW prays for judgment:

1. Dismissing plaintiffs' claims with prejudice;

2. Awarding LFW its costs, including reasonable attorneys fees; and

3. Awarding LFW such other or further relief in law or equity that the Court deems appropriate or just.

DATED: March 3, 1997

PERKINS COIE

By /s/_____
David J. Burman, WSBA #10611
Nicholas P. Gellert, WSBA #18041
Attorneys for Defendants
Legal Foundation of Washington and
Kevin F. Kelly

ANSWER TO COMPLAINT OF SUPREME COURT DEFENDANTS
March 10, 1997

Barbara Durham, Chief Justice of the Supreme Court of Washington; Gerry L. Alexander, Justice; James M. Dolliver, Justice; Richard P. Guy, Justice; Charles W. Johnson, Justice; Barbara A. Madsen, Justice; Charles Z. Smith, Justice; and Philip A. Talmadge, Justice ("Defendants"), in answer to plaintiffs' Amended Complaint for Injunctive Relief, admit, deny and allege as follows:

1. In response to Paragraph 1, Defendants admit that this is an action alleging that certain rules promulgated by the Supreme Court of Washington relating to Certified Closing Officers are unconstitutional, deny that those rules are unconstitutional, and deny the remaining allegations of Paragraph 1.

2. In response to Paragraph 2, Defendants admit that the Supreme Court of Washington has adopted rules relating to interest on lawyer trust accounts and certified closing officers, the terms of which speak for themselves. defendants deny the remaining allegations of Paragraph 2.

3. The allegations of Paragraph 3 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 3 are denied.

Jurisdiction

4. The allegations of Paragraph 4 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 4 are denied.

5-8. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 5 through 8 and therefore deny them.

9. The allegations contained in the first sentence of Paragraph 9 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of the first sentence of Paragraph 9 are denied. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 9 and therefore deny them.

10. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 and therefore deny them.

11. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 11 and therefore deny them. The allegations of the second sentence of Paragraph 11 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of the second sentence of Paragraph 11 are denied.

12. Defendants admit the allegations of the first sentence of Paragraph 12. The remaining allegations of Paragraph 12 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 12 are denied.

13-22. Defendants admit the allegations of Paragraphs 13 through 22.

Statement of the Claim
Creation of the IOLTA Program

23-25. In response to Paragraphs 23 through 25, Defendants admit that on June 19, 1984, the Supreme Court

of Washington entered Order No. 25700-A-357 In the Matter of the Adoption of Amendments to CPR DR 9-102, the provisions of which speak for themselves. The remaining allegations Paragraphs 23 through 25 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 23 through 25 are denied.

26. In response to Paragraph 26, Defendants admit that a copy of the current version of RPC 1.14 is attached to the Amended Complaint as Exhibit A. The remaining allegations of Paragraph 26 constitute legal conclusions and arguments to which no response is required. To the extent a response is required, the remaining allegations of Paragraph 26 are denied.

27-28. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 27 and 28 and therefore deny them.

29. In response to the second sentence of Paragraph 29, Defendants state that the provisions of RPC 1.14 speak for themselves. The remaining allegations of Paragraph 29 legal conclusions and arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 29 are denied.

30. Defendants lack information sufficient to form a belief as to the truth of the allegations of Paragraph 30 and therefore deny them.

Limited Practice Officers

31-32. Defendants lack information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 31 and 32 and therefore deny them.

33. Defendants deny the allegations of the first sentence of Paragraph 33. I response to the second sentence of Paragraph 33, Defendants admit that the Supreme Court of Washington adopted APR 12, the terms of which speak for themselves. The remaining allegations of Paragraph 33 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 33 are denied.

34-35. Defendants admit that the Supreme Court of Washington received a proposal from the Washington Bar Association in June of 1993 to amend APR 12, that proponents and opponents of the proposal submitted comments and briefs in connection with the proposed rule changes, and that oral argument on the petition was conducted on September 24, 1994. The remaining allegations of Paragraphs 34 and 35 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraphs 34 and 35 are denied.

36. Defendants admit that by order dated September 21, 1995, the Washington Supreme Court amended APR 12 to add new subsection, 12(h), and adopted APR 12.1, the terms of which speak for themselves, and that a copy of APR 12(h) and 12.1 is attached to the amended complaint as Exhibit B. The remaining allegations of Paragraph 36 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 36 are denied.

37. In response to the allegations of Paragraph 37, Defendants state that the terms of APR 12(h) and APR 12.1 speak for themselves. The allegations contained in Paragraph 37 constitute legal conclusions or arguments to which no

answer is required. To the extent an answer is required, the remaining allegations of Paragraph 37 are denied.

38. Defendants admit that APR 12.1 and APR 12(h) became effective December 9, 1995. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 38 and therefore deny them.

39. Defendants admit that Justice Sanders wrote a letter dated March 13, 1996, concerning APR 12.1, the terms of which speak for themselves, and deny the remaining allegations of Paragraph 39.

40. Defendants admit that Justice Sanders prepared subsequent correspondence concerning APR 12.1, the terms of which speak for themselves, and deny the remaining allegations of Paragraph 40.

41. Defendants admit that the Limited Practice Board has submitted proposed changes to its rules for admission and discipline, the terms of which speak for themselves; that comments have been received with regard to the proposed changes; and that the proposed changes are under consideration. The remaining allegations of Paragraph 41 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 41 are denied.

42. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 and therefore deny them.

43. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 and therefore deny them.

44. In response to Paragraph 44, Defendants state that the Articles of Incorporation of the Legal Foundation of Washington speak for themselves and that the allegations of

Paragraph 44 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 44 are denied.

45-49. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 45 through 49 and therefore deny them.

The Plaintiffs' Dealing with IOLTA

50-54. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 50 through 54 and therefore deny them.

55. The first sentence of Paragraph 55 constitutes legal conclusions or arguments to which no answer is required. To the extent an answer is required, the allegations of the first sentence of Paragraph 55 are denied. Defendants are without information sufficient to form a belief as to the truth of the allegations of second sentence of Paragraph 55 and therefore deny them.

56. In response to the second sentence of Paragraph 56, Defendants deny that compliance with APR 12(h) and APR 12.1 would entail violation of a fiduciary obligation. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 56 and therefore deny them.

57. In response to the allegations of the first sentence of Paragraph 57, Defendants deny that compliance with APR 12(h) and APR 12.1 would violate fiduciary obligations. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 57 and therefore deny them.

58. Defendants deny the allegations of the first sentence of Paragraph 58. The remaining allegations of Paragraph 58 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 58 are denied.

59-61. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 59 through 61 and therefore deny them.

Count I
(First Amendment)

62. Defendants incorporate by reference their answers to the allegations of Paragraphs 1 through 61.

63-65. The allegations of Paragraphs 63 through 65 constitute legal conclusions to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 63 through 65 are denied.

Count II
(Fifth Amendment)

66. Defendants incorporate by reference their answers to the allegations of Paragraphs 1 through 61.

67-68. The allegations of Paragraphs 67 and 68 constitute legal conclusions to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 67 and 68 are denied.

Count III
(Fifth Amendment)

69. Defendants incorporate by reference their answers to the allegations of Paragraphs 1 through 61.

70. The allegations of Paragraph 70 constitute legal conclusions to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 70 are denied.

BY WAY IF FURTHER ANSWER AND AFFIRMATIVE DEFENSES, Defendants allege:

1. That the Court lacks jurisdiction over the subject matter of this action.

2. That defendants are immune from suit for matter charged in Plaintiffs' Amended Complaint.

3. That Plaintiffs have failed to state a claim upon which relief may be granted.

4. That the bar of collateral estoppel applies.

WHEREFORE, having fully answered the Amended Complaint herein, Defendants request the following relief:

1. That Plaintiffs' Amended Complaint be dismissed with prejudice.

2. That Defendants be awarded their costs and attorneys' fees.

3. That the Court order such further relief as may be appropriate.

DATED this 10th day of March, 1997.

CHRISTINE O. GREGOIRE
Attorney General

s/ MAUREEN HART
MAUREEN HART, WSBA #7831
Solicitor General
(360) 753-2536

DECLARATION OF BILL RONHAAR

1. I, Bill Ronhaar, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am Manager of Land Title Company of Skagit County, located in Mt. Vernon, Washington.

3. In April 1997, Land Title Company was involved as escrow agent in connection with a contract to sell real estate located at 520 N. 21st St., Mt. Vernon, Washington 98273. Pursuant to the terms of the purchase and sales agreement, Mr. Allen Brown (the purchaser) deposited $90,521.29 with Land Title Company.

4. Land Title Company deposited the funds in its escrow account, maintained at Skagit State Bank. At the time of the deposit, the escrow account was an IOLTA account paying interest at a rate of 1% per annum. An IOLTA account is one in which interest is paid to the Legal Foundation of Washington. Land Title Company established an IOLTA account solely because it was required to do so by APR 12.1.

5. Mr. Brown's funds remained in Land Title Company's escrow account for two days until May 1, 1997, when the sale closed and the escrow funds were disbursed.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ BILL RONHAAR
Bill Ronhaar

Dated: November 3, 1997

AFFIDAVIT OF SHARON S. BRINLEY

SHARON S. BRINLEY, being first duly sworn on oath, deposes and says:

1. I, Sharon S. Brinley, am over 18 years of age, and am competent to testify about the matters set forth herein, and I submit the testimony below based upon personal knowledge and information. I make this affidavit in connection with Plaintiffs' Motion for Summary Judgment.

2. I am employed in the Escrow Department of Fidelity National Title Company of Washington ("Fidelity") in Bellevue, Washington. I am a Limited Practice Officer (LPO) pursuant to the Supreme Court of Washington's Admission to Practice Rule (APR) 12.

3. In connection with my employment, I handled the closing of the 1996 sale of real estate located at 807 - 3rd Avenue North, Kent, Washington 98032 (the "Sale"). The seller in that transaction was Kevin W. Beck; the buyers were Roger L. Fossum and Plaintiff Gregory W. Hayes.

4. On our about August 14, 1996, I received from the buyers a check for $2,000, which represented their earnest money deposit in connection with the sale. I deposited that check into Fidelity's IOLTA trust account, maintained at SEAFIRST Bank. Attached hereto as Exhibit A is the receipt given by Fidelity to the buyers in connection with that earnest money deposit. [Exhibit Omitted.]

5. On or about August 28, 1996, I gave to the buyers an estimated closing statement for the sale, attached hereto as

Exhibit B. That document indicated that the buyers were required to provide an additional $12,793.32 to close the Sale. [Exhibit Omitted.]

6. On or about August 28, 1996, I received from the buyers a certified check in the amount of $12,780.87, and personal check no. 5594 in the amount of $12.45, for a total deposit of $12,793.32 in connection with the closing. I deposited the check into Fidelity's IOLTA trust account.

7. The Sale closed on or about August 30, 1996, and funds held in the Fidelity's trust account were disbursed in accordance with the closing instructions. Attached hereto as Exhibit C is the final closing statement, dated August 30, 1996. [Exhibit Omitted.]

8. I deposited funds received from the buyers into Fidelity's IOLTA account pursuant to the requirements of APR 12.1. That account is an interest-bearing account, with interest earned thereon being paid by SEAFIRST Bank to the Legal Foundation of Washington.

9. Some time after the adoption of APR 12.1 by the Supreme Court of Washington in 1995, SEAFIRST Bank stopped offering earnings credits on Fidelity's interest-bearing IOLTA trust account. Earnings credits are credits offered by Washington Banks to some of their customers based on the amount of funds the customers maintain in their non-interest-bearing accounts; although not redeemable for cash, the credits can be used to obtain a wide variety of bank services (such as account reconciliations, money transfer charges, and returned check charges) at no cost. SEAFIRST Bank was not

offering earnings credits to Fidelity on its IOLTA trust account in August 1996, nor is it doing so today.

Further affiant sayeth not.

DATED this 3rd day of November, 1997.

s/ SHARON S. BRINLEY
Sharon S. Brinley

SUBSCRIBED AND SWORN to before me this 3rd day of November, 1997.

s/ MICHAEL A. LYNCH
Michael A. Lynch
Notary Public in and for
the State of Washington
Residing at: Issaquah
My commission expires: 6-9-98

DECLARATION OF ALLEN BROWN

1. I, Allen Brown, am over 18 years if age, and am competent to testify about the matters set forth herein.

2. In the course of my business dealings, I regularly purchase and sell real estate located in the State of Washington, and I expect to continue to do so.

3. In April 1997, I entered into a contract to purchase real estate located at 520 N. 21st St., Mt. Vernon, Washington 98273. Pursuant to the terms of the purchase and sales agreement, I deposited $90,521.29 with Land Title Company, whose escrow department was handling the closing. It is my understanding that Land Title Company deposited the escrow funds in an IOLTA account maintained at Skagit State Bank. The funds remained in that account for two days until May 1, 1997, when the sale was closed and the escrow funds were disbursed.

4. Based on my understanding that funds I paid to Land Title Company were deposited in an interest-bearing account, I believe that interest on my funds was paid to Defendant Legal Foundation of Washington (LFofW). I object to anyone other than me taking the interest earned on my funds. I also object to some of the activities engaged in by LFofW and by those to whom LFofW distributes IOLTA funds.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ ALLEN BROWN
Allen Brown
Dated: November 3, 1997

DECLARATION OF GREGORY HAYES

1. I, Gregory Hayes, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. In the course of my business dealings, I have purchased real estate located in the State of Washington, and I expect to continue to do so.

3. In August 1996, I (along with my business partner, Roger Fossum) entered into a contract to purchase real estate located at 807 3rd Ave. North, Kent, Washington 98032. Pursuant to the terms of the purchase and sales agreement, Mr. Fossum and I on or about August 14, 1996, each gave a $1,000 earnest money deposit to Fidelity National Title Co. (of Bellevue, Washington). Based on a notation included on a receipt given to us by Fidelity, I believe that Fidelity deposited the earnest money funds into its IOLTA account.

4. On or about August 28, 1996, Mr. Fossum and I each gave an additional $6,396.66 to Fidelity, the amount needed to close the transaction. The transaction closed (and Fidelity disbursed funds being held in escrow) on August 30, 1996.

5. Based on my understanding that funds I paid to Fidelity were deposited in an interest-bearing IOLTA account, I believe that interest on my funds was paid to Defendant Legal Foundation of Washington (LFofW). I object to anyone other than me taking the interest earned on my funds.

I also object to some of the activities engaged in by LFofW and by those to whom LFofW distributes IOLTA funds.

6. I was never informed at the time we purchased the Kent, Washington property that my escrow funds were being placed into an IOLTA account. Indeed, I never heard of IOLTA until after the transaction had been completed.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ GREGORY HAYES
Gregory Hayes

Dated: November 3, 1997

DECLARATION OF DENNIS H. DAUGS

1. I, Dennis H. Daugs, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am President and co-owner, along with my wife Nina Daugs, of SeaTac Escrow, Inc. ("SeaTac"), an escrow company operating in Federal Way, Washington. SeaTac provides escrow services to buyers and sellers in connection with real estate transactions.

3. Incidental to my duties as an escrow officer for SeaTac, I select and fill in blanks on pre-approved form legal documents necessary to effectuate the transfer of title to real estate from a seller to a purchaser; I am authorized to select and fill in such documents by virtue of being licensed as an LPO ("Limited Practice Officer") by the Supreme Court of Washington. Although the selecting and filling in of form legal documents is a necessary component of the real estate closing process, those activities do not in fact constitute more than a negligible portion of the time that I spend on behalf of escrow customers.

4. I regularly deposit into SeaTac's escrow account funds given to me by my customers. As the trustee of those funds, I owe a fiduciary duty of loyalty to my customers to act in their best interests at all time. Although equitable title to the funds remains in the hands of my customers, SeaTac holds legal title to funds in SeaTac's escrow account.

5. Because I am an LPO, APR 12.1 mandates that I place escrow funds into an interest-bearing IOLTA account and direct my bank to forward interest generated by the account to the Legal Foundation of Washington.

6. However, I do not comply with APR 12.1 because I have determined that doing so would violate SeaTac's Fifth Amendment rights (as the holder of legal title to funds in the escrow account) and those of my customers (who hold equitable title to the funds). If interest is to be paid on the escrow account, I believe that the Fifth Amendment requires that the interest be paid to the owner of those funds. My customers are better served by keeping their funds in a non-interest-bearing escrow account; earnings credits granted by SeaTac's bank in connection with those funds allow the account to avoid having to pay for numerous services provided by the bank.

7. I also do not comply with APR 12.1 because I object to some of the activities engaged in by LFofW and by those to whom LFofW distributes IOLTA funds. I believe that requiring me to associate with the IOLTA program by requiring me and my company to establish an IOLTA account violates my rights under the First Amendment.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/DENNIS DAUGS
Dennis H. Daugs

Dated: November 3, 1997

DECLARATION OF L. DIAN MAXWELL

1. I, L. Dian Maxwell, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am employed by Pacific Northwest Title Company of Washington, Inc. ("PNW Title"), a company that, among other things, provides escrow services to buyers and sellers in connection with real estate transactions. Incidental to my job responsibilities as an escrow officer, I selected and filled in blanks on pre-approved form legal documents necessary to effectuate the transfer of title to real estate from a seller to a purchaser; I was authorized to select and fill in such documents by virtue of being licensed as an LPO ("Limited Practice Officer") by the Supreme Court of Washington. Although the selecting and filling in of form legal documents is a necessary component of the real estate closing process, those activities in fact never constituted more than a negligible portion of the time that I spent on behalf of escrow customers.

3. In late 1995, the Supreme Court of Washington adopted APR 12(h) and 12.1 in order to make LPOs (and companies employing the services of LPOs) subject to the IOLTA program. In response to that action, PNW Title determined that it would no longer employ LPOs in order to avoid the costs of complying with APR 12(h) and 12.1 and to protect the constitutional rights of its customers. I was told by others at PNW Title that those compliance costs would increase the cost of the average escrow transaction by $50.00.

4. In the fall of 1996, PNW Title informed me and other LPOs employed by PNW Title that, if we wished to continue to be employed by PNW Title, we would be required to surrender our licenses as LPOs. Recognizing that there were extremely few positions comparable to mine within the escrow industry, I responded by surrendering my LPO license on November 27, 1996. As a result, I am no longer permitted to practice my profession fully, and to select and fill in the legal documents that I am fully qualified to select and fill in.

5. PNW Title's customers must now make arrangements to hire their own attorneys to perform the document-drafting work formerly performed by PNW Title's LPO's.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

S/ L. DIAN MAXWELL
L. Dian Maxwell

Dated: November 3, 1997

DECLARATION OF NICHOLAS GELLERT

I, Nicholas Gellert, declare as follows under penalty of perjury:

1. I am an attorney at Perkins Coie representing defendants Legal Foundation of Washington and Kevin F. Kelly (collectively "LFW"). I have personal knowledge of the matters set forth herein.

2. Exhibits 1 and 2 hereto are true and correct copies of documents produced by plaintiff Dennis H. Daugs herein in response to LFW's discovery requests and marked as Exhibits 1 and 2 to the October 15, 1997, deposition of Mr. Daugs in this matter. At his deposition, Mr. Daugs identified Exhibit 1 as the most current version of the contract between the bank and SeaTac Escrow. He identified Exhibit 2 as the most current version of the contract between the bank and SeaTac Systems. Daugs deposition at 26. He further testified that these documents set forth all the terms of those agreements. Id. at 27.

3. Attached hereto as Exhibit 3 is a true and correct copy of an April 26, 1994 letter produced herein by plaintiffs in response to LFW's discovery requests.

4. Finally, attached hereto are true and correct copies of the pages of the transcripts of the following depositions cited in the Memorandum in Support of Legal Foundation of Washington's Motion for Summary Judgment and in paragraph 2 of this Declaration.

Exhibit 4. Dennis H. Daugs (October 15, 1997)

Exhibit 5. L. Dian Maxwell (October 16, 1997)

Exhibit 6. Gregory Hayes (October 16, 1997)

Exhibit 7. Allen D. Brown (October 20, 1997)

SIGNED, under penalty of perjury of the laws of the United States and the State of Washington, this 5th day of November, 1997, in Seattle, Washington.

s/ NICHOLAS GELLERT
Nicholas Gellert

Exhibit 1 to Declaration of Nicholas Gellert

CUSTOMER AGREEMENT
ESCROW ACCOUNT SERVICES

THIS AGREEMENT is made effective on the ____ day of _____, 19___ by and between COLUMBIA STATE BANK ("Bank") and the customer ("Customer") whose name and address appear below:

SeaTac Escrow Inc.
Name
2016 South 320th, Suite L
Address
Federal Way, WA 98003
City, State, Zip Code

_____
Contact Person/Telephone Number

RECITALS

A. Customer is in the business of serving as an escrow agent and/or holding assets of its clients which services require the performance of certain accounting reconciliation, documentation, escrow closing and other related services (collectively, the "Services").

B. Bank does not provide such Services to its Customers; however, Bank desires to make such Services available to Customer through a third party provider ("Provider") under contract with Bank.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the parties agree as follows:

AGREEMENT

1. Services. Bank agrees to arrange with Provider to perform Services on behalf of Customer and to pay Provider for such Services, and Customer agrees to accept and reimburse Bank for such Services in accordance with the terms of this Agreement. The Services [that] shall be provided to Customer will include those specific Services set forth on the "Schedule of Services and Fees" appearing as Exhibit A attached hereto. Notwithstanding, Customer acknowledges and agrees that Bank's obligations under this Agreement are expressly conditioned upon Provider's acceptance of Customer and this Customer Agreement.

2. Term. Subject to the Termination provisions herein, the term of this Agreement shall run for one year, beginning on the date first above written.

3. Voluntary Termination; Automatic Termination; Notice. This Agreement may be terminated voluntarily by either party upon 30 days written notice to the other. This Agreement shall also terminate automatically upon the happening of either of the following events: (i) Customer's account with Bank is closed for any reason, or (ii) the agreement between Bank and Provider (the "Provider Agreement") is terminated for any reason, unless a substitute Provider is agreed to by Customer and Bank. Promptly following any automatic termination, Bank agrees to provide Customer with written notice thereof. Notwithstanding, however, no termination of this Agreement or the Provider Agreement shall relieve Customer of any duties to reimburse Bank for any Service Fees (as defined in Section 4 below) accruing prior to the date of such termination.

4. Service Fees; Reimbursement. Bank has made arrangements with Provider pursuant to which Bank will pay Provider for all Services rendered to Customer under this Agreement. Customer agrees to reimburse Bank for such payments in the manner set forth in Section 5 below. Customer acknowledges and agrees that the fees to be reimbursed by Customer hereunder (hereinafter "Service Fees") as set forth on the attached "Schedule of Services and Fees" do not include the cost of standard banking services and supplies, which include, but are not limited to, checks, drafts, deposit slips and other forms and supplies, and Customer agrees to pay for such standard banking services and supplies separately in accordance with Bank's normal fee schedule.

5. Payment of Fees; Credits. Customer shall reimburse Bank for Service Fees paid by Bank either (i) in cash, (ii) by earning sufficient Credits (as defined below) to offset such Service Fees, or (iii) in a combination thereof.

a. Credits. Customer shall earn Credits each month based upon the average collected balances in Customer's designated account with Bank. Credits are calculated as follows:

(1) Calculation. Bank shall calculate Customer's average collected balance for each month (determined in accordance with Bank's normal check collection schedule). From this balance, Bank shall subtract an amount equal to the required reserves for Customer's account as required by Federal Reserve regulations. The result is then multiplied by the Earnings Credit Rate (equal to the average weekly discount rate for 13 week Treasury Bills

auctioned during the preceding month, as published by the Federal Reserve Bank of San Francisco), then divided by the number of days in the calendar year. The result shall equal the Credit value for one day, which is then multiplied by the number of days in the month to arrive at the Credit value for the month.

(2) Example. By way of example, if Customer had an average collected balance of $300,000 in the month of July during a non-leap year and the Earnings Credit Rate for June was 3.663%, Customer's Credit would be calculated as follows:

	$300,000.00	Collected Balance
-	$30,000.00	Less 10% Reserve Requirements
	$270,000.00	
x	.03663	Earnings Credit Rate for June
	$9,890.10	
÷	365	Number of days in calendar year
	$27.10	
x	31	Number of days in month
	$839.98	Total Credit for July

b. Insufficient Credit; Credit Surplus. In the event that Customer fails to earn or accumulate sufficient Credit to offset any Service Fees which are due and payable to Bank, Bank shall either debit Customer's account for any Service Fees due or issue an invoice to Customer for such Service Fees, in which case Customer shall pay to Bank the entire amount invoiced within ten days of receipt of such invoice. Surplus credit shall not accumulate from month to month, and any Credits earned during any one month in excess of those

required to offset Service Fees incurred during such month shall be canceled.

c. Nature of Credit. Credit earned by Customer shall be used exclusively to offset Service Fees incurred pursuant to this Agreement and may not be applied to offset any other fees or charges imposed by Bank. Credit shall be non-transferable, and shall not be considered, nor convertible into, cash or any other thing of value.

6. Bank's Relationship with Provider. Customer acknowledges that the Services offered in connection with this Agreement are provided as a function of a special escrow accounting system provided by and under the exclusive control of Provider. Bank's sole function under this Agreement is to act as the depository for Customer's funds in accordance with Bank's normal banking practices. Provider is an independent contractor providing services over which Bank has no power to supervise, direct or otherwise regulate. Provider is not an agent of Bank and has no authority whatsoever to create any obligations binding on Bank or to represent the Bank in any manner. Performance of the Services contemplated by this Agreement shall be the sole responsibility of Provider, and Bank shall not perform or participate in the performance of any such Services. Nothing in this Agreement shall create or extend any obligation, liability or duty of Bank or Customer to any other person or entity pursuant to any other contract, agreement (including the Provider Agreement) or relationship between Bank or Customer and such person.

7. Effect on Account Agreement. Customer and Bank acknowledge and agree that this Agreement shall supplement Bank's existing rules and regulations governing deposit

accounts as well as any other agreements between Customer and Bank with respect to such accounts. Except as specifically amended or modified hereby, such rules, regulations and requirements shall remain in full force and effect.

8. Communication. Any questions or correspondence relating to the Services to be provided hereunder should be directed to Provider at the address set forth below:

SeaTac Escrow Inc.
Provider's Name
2016 South 320th, Suite L
Address
Federal Way, WA 98003
City, State, Zip Code

_____
Contact Person/Telephone Number

All matters relating to Customer's account with Bank or any Banking transaction should be directed to Bank at the address set forth in Section 11 below.

9. Compliance with Regulation Q. Customer hereby represents and warrants to Bank that Customer is not a subsidiary of Provider and that Customer is not a party to any arrangement with Provider through which Customer will receive, directly or indirectly, payments of money or other things of value resulting from Customer's execution and performance of this Agreement. Customer shall indemnify, defend and hold Bank harmless from and against any loss or damage suffered by Bank as a result of Customer's violation of this warranty.

10. Miscellaneous.

a. Attorneys Fees. In the event of any legal action, including, without limitation, arbitration or the filing of a lawsuit to enforce any of the terms of this Agreement, the prevailing party (as determined by the court or arbitrator) shall be entitled to an award of all costs, including reasonable attorneys fees, incurred in such action, including those costs and fees incurred on appeal.

b. Governing Law; Venue. This Agreement and any interpretation thereof shall be governed by and interpreted in accordance with the laws of the State of Washington, and any legal action by either party in connection with this Agreement shall be brought in Pierce County, Washington, or such other venue as the parties may agree.

c. Notices. Any notices required under this Agreement shall be in writing and sent, in the case of Provider, to the address appearing on the first page of this Agreement, and in the case of Bank, to the following address:

Columbia Bank
1102 Broadway Plaza
Tacoma, Washington 98401
Attn: Cash Management

d. Entire Agreement. This Agreement constitutes the entire agreement between the parties.

e. Successors; Assignment. This agreement shall be binding on the parties, their successors and assigns. This

Agreement may not be assigned by either party without the express, written consent of the other party.

f. Amendments. No amendments to this Agreement shall be of any force and effect unless in writing and executed by the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement effective on the date first above written.

BANK:	**CUSTOMER:**
COLUMBIA STATE BANK	**SEATAC ESCROW, INC.**
By /s/	By */s/ Nina M. Daugs*
Its VP	Its President

Exhibit 2 to Declaration of Nicholas Gellert

PROVIDER AGREEMENT
ESCROW ACCOUNT SERVICES

THIS AGREEMENT is made effective on the _____ day of _____, 19___ by and between COLUMBIA STATE BANK ("Bank") and the account services provider ("Provider") whose name and address appears below:

SeaTac Systems Inc.
Name
2016 South 320th, Suite L
Address
Federal Way, WA 98003
City, State, Zip Code

_____
Contact Person/Telephone Number

RECITALS

A. Provider is in the business of providing accounting, reconciliation, documentation, escrow closing and other related services (collectively, the "Services") to escrow companies and other businesses.

B. Bank does not offer such Services to its customers; however, Bank desires to make the Services available to those escrow companies and certain other businesses which are customers of Bank.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the parties agree as follows:

AGREEMENT

1. Services. Provider agrees to provide the Services to Customers (as defined below) on behalf of Bank, and Bank agrees to pay Provider for the Services pursuant to the terms and conditions of this Agreement. The Services shall be provided to Customers in accordance with Provider's standard operating procedures and shall include those specific Services set forth on the "Schedule of Services and Fees" appearing as Exhibit A attached hereto.

2. Term. The term of this Agreement shall commence on the date first above written and shall continue until terminated by either party upon thirty days written notice to the other.

3. Definition of "Customers"; Customer Agreements; Termination. As used in this Agreement, the term "Customers" shall mean those escrow companies and other businesses who (i) have been approved in advance by Provider; (ii) maintain an account with Bank, and (iii) have entered into an agreement ("Customer Agreement") with Bank covering the provision of and payment for Services, which agreement shall be substantially in the form attached hereto as Exhibit B. A Customer shall immediately cease to eligible for the Services offered by Provider upon Customer's failure to maintain such an account or upon any termination of the Customer Agreement, and upon the happening of either event Bank agrees to provide prompt notice thereof to Provider.

4. Compensation; Invoices. Bank agrees to pay Provider in accordance with the attached Schedule of Services and Fees for the services Provider performs on behalf of

Customers. Provider shall submit monthly invoices for Services so provided, and Bank agrees to remit payment for such Services within 30 days following its receipt and approval of such invoice.

5. Independent Contractor Status. The parties hereby acknowledge and agree that Provider is an independent contractor and that Bank has no power to supervise, direct or otherwise regulate Provider, its agents or employees in the performance of the Services hereunder. Provider is not an agent of Bank and shall have no authority whatsoever to create any obligations binding on the Bank or to represent the Bank in any manner. Performance of the Services contemplated by this Agreement shall be the sole responsibility of Provider, and Bank shall not perform or participate in the performance of any such Services.

6. Indemnification; Third Parties. Provider shall indemnify, defend and hold Bank harmless from and against any loss, damage or claims of any kind or nature (including attorneys fees), whether asserted by a Customer or any other person, arising out of or with respect to Services performed by Provider, irrespective of whether such Services are within the scope of those contemplated by this Agreement. Nothing in this Agreement shall create or extend any obligation, liability or duty of Bank or Provider to any other person or entity pursuant to any other contract,. agreement (including a Customer Agreement) or relationship between Bank or Provider and such person.

7. Compliance with Regulation Q. Provider hereby represents and warrants to Bank that Provider is not a subsidiary of any Customer and that Provider is not a party

to any arrangement with any Customer through which such customer will receive, directly or indirectly, payments of money or other things of value resulting from such Customer's execution and performance of the Customer Agreement.

8. Examinations; Audits. In the event of an examination or audit of the Bank by any regulatory agency, Provider agrees to provide such information to and cooperate with such agency as may be required by Bank.

9. Miscellaneous.

a. Attorneys Fees. In the event of any legal action, including, without limitation, arbitration or the filing of a lawsuit to enforce any of the terms of this Agreement, the prevailing party (as determined by the court or arbitrator) shall be entitled to an award of all costs, including reasonable attorneys fees, incurred in such action, including those costs and fees incurred on appeal.

b. Governing Law; Venue. This Agreement and any interpretation thereof shall be governed by and interpreted in accordance with the laws of the State of Washington, and any legal action by either party in connection with this Agreement shall be brought in Pierce County, Washington, or such other venue as the parties may agree.

c. Notices. Any notices required under this Agreement shall be in writing and sent, in the case of Provider, to the address appearing on the first page of this Agreement, and in the case of Bank, to the following address:

Columbia Bank
1102 Broadway Plaza
Tacoma, Washington 98401
Attn: Cash Management

d. Entire Agreement. This Agreement constitutes the entire agreement between the parties.

e. Successors; Assignment. This agreement shall be binding on the parties, their successors and assigns. This Agreement may not be assigned by either party without the express, written consent of the other party.

f. Amendments. No amendment to this Agreement shall be of any force and effect unless in writing and executed by the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement effective on the date first above written.

BANK:	PROVIDER:
COLUMBIA STATE BANK	Seatac Systems, Inc.
By: /s/	By /s/ Dennis H. Daugs
Its V.P.	Its President

List of Exhibits:

Exhibit A	Schedule of Services and Fees
Exhibit B	Customer Agreement Form

EXHIBIT A [to the Provider Agreement]
SCHEDULE OF SERVICES AND FEES

Bank agrees to pay SeaTac Systems Inc. each month a fee based on 3.5% of the customer's average monthly collected balances divided by 365 days in the year and then multiplied by the number of days in the month, as consideration for the automated escrow accounting services to be provided to customer.

EXHIBIT B [to the Provider Agreement]
CUSTOMER AGREEMENT FORM

[Blank]

Exhibit 3 to Declaration of Nicholas Gellert

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

ADDRESS OFFICIAL CORRESPONDENCE
TO THE BOARD

April 26, 1994

Mr. Gerald R. Wheeler
Certified Public Accountant
33749-A 9th Ave. S.
Federal Way, WA 98003

Dear Mr. Wheeler:

This is in response to your letter of March 15, 1994 requesting guidance with respect to payment of interest on demand deposits of escrow companies in light of the letter of March 9, 1994 from the Federal Reserve Bank of San Francisco. That letter found a particular practice involving deposits by escrow companies to be in violation of Regulation Q (12 C.F.R. 217), which prohibits the payment of interest on demand deposits. This practice involved payments by a bank to wholly owned subsidiaries of title and escrow companies where the title and escrow companies held demand deposits at the bank. Although the subsidiaries provided account related services to their parent title and escrow companies that could have been provided by the bank, because these subsidiaries were not in the business of providing such services generally and because they were wholly owned subsidiaries of bank customers holding demand

deposits, board staff concluded that this practice amounted to the payment of interest on demand deposits.

Your letter raises four questions. First, if the service company is an affiliate of the title and escrow company other than a subsidiary, will the payments still be imputed to the depositor? Second, what are normal banking services? Third, if the bank and/or the service provider calculate(s) an earnings credit based on the deposit balances and short term interest rates, does this in itself cause a violation of Regulation Q? Fourth, if the service companies have no revenue for their services other than from banks pursuant to earnings credits, does this invalidate their claim that their services are provided for value?

As noted in the Federal Reserve Bank of San Francisco's letter, Regulation Q states:

> No member bank of the Federal Reserve System shall, directly or indirectly, by any device whatsoever, pay any interest on any demand deposit.

12 CFR 217.3 (footnote omitted). "Interest" is defined as:

> . . . any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit. A member bank's absorption of expenses incident to providing a normal banking function or its forbearance from charging a fee in connection with such a service is not considered a payment of interest.

12 C.F.R. 217.2(d). A staff opinion points out that such absorption:

would not constitute the payment of interest, since the bank does not actually pay funds to the depositor, although the customer does benefit from the charges absorbed. This should be distinguished, however, from instances in which a rebate is actually paid to the customer based on a deposit balance maintained at the bank.

Staff Op. of Oct. 27, 1978 (I Fed. Res. Reg. Serv. 2-543).

With respect to your first question, payment to a wholly owned subsidiary of the depositor is imputed to the depositor because it is a direct financial benefit to the depositor. In a consolidated financial statement of the depositor and its subsidiary, a payment to the subsidiary is accounted for as a payment to the consolidated whole, and the depositor benefits from the payment whether made to it or to its subsidiary.[1] However, staff believes that payment to an affiliate of the depositor that is not a subsidiary does not constitute payment to or for the account of the depositor, as it is not a direct financial benefit to the depositor. Even if the affiliate is wholly owned by a person or company which wholly owns the depositor, the affiliate would not appear in a consolidated financial statement of the depositor, and payment to the affiliate would not benefit the depositor, although it would benefit the owner of the depositor. (A rebate of any portion

[1] The imputation to the depositor of a payment to its subsidiary by a bank does not, by itself, constitute a violation of Regulation Q. If the subsidiary is in the business of providing these services to others generally on the same terms, then the payments may not be "compensation for the use of . . . a deposit." See the discussion of your third and fourth questions below.

of a payment to the customer or a subsidiary thereof could lead to a different result.)

With regard to normal banking functions or services, the Board has in the past considered the provision, inter alia, of the following services without charge in the context of municipal deposits to be normal banking services the provision of which do not constitute payment of interest: processing of shipping and insurance in connection with transfers on collections of municipal bonds or coupons, preparation of reports, maintenance of a permanent record of checks and deposits, and operation of a state's warrant processing and reconciliation system. Staff Op. of Jan 3, 1974 (I Fed. Res. Reg. Serv. 2-540).

In the context of deposits by title and escrow companies, you inquired about:

- automated escrow closing trust accounting and bank reconciliation;
- monthly general ledger and financial statements pertaining specifically to escrow accounting service (including FDIC requirements where appropriate);
- tax reporting;
- IRS information returns;
- courier and messenger service expense;
- forms and miscellaneous supplies;
- telefax and xeroxing charges.

Staff believes that in the context of deposits by title and escrow companies, these services may be regarded as normal banking functions for which the bank may absorb the expenses.

With regard to your third and fourth questions, in the context of services provided by subsidiaries or other affiliates of title and escrow company depositors, staff believes that the pricing of these services is of limited significance. Where the service is provided by a wholly owned subsidiary of the depositor, payments to the subsidiary should be viewed as payment of interest on the parent's deposit, regardless of amount, unless the subsidiary is in the business of providing these services to others generally. In that case, however, the amount of the payments becomes relevant as excess payments to the subsidiary could result in payment of interest on the parent's demand deposit.

We hope this letter will be helpful to you and the banks you work with in avoiding violations of Regulation Q. Further questions may be addressed to J. Ericson Heyke III (202-452-3688) or Oliver Ireland (202-452-3625) at the Board of Governors or to Robert D. Mulford (415-974-2256) at the Federal Reserve Bank of San Francisco.

Very truly yours,

/s/
Oliver Ireland
Associate General Counsel

Exhibit 4 to the Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
PETITIONER DENNIS H. DAUGS
October 15, 1997

Page 6 of Deposition Transcript

Q How long did you sell real estate?
A I sold and managed real estate until about '86, I guess.

Q Then what did you do in 1986?
A In 1986 my wife wanted to open her own escrow company so I went over to help her and I've been there ever since.

Q What's your wife's name?
A Nina.

Q Also Daugs?
A Daugs, yes, Nina Marie Daugs, officially.

Q Had she been in the escrow business prior to wanting to open her own company?
A Yes.

Q For how long had she been in the business prior to 1986?
A She came up to Washington in '79, approximately, prior to that she was in the escrow business in California for a whole bunch of years. She's been in the escrow business, let's see, somewhere around 26, 27, 28 years.

* * *

Pages 24-27

Q Do you know whether the Columbia State Bank pays the same rate of interest on the IOLTA account as it does on the specific clients interest bearing accounts?
A I don't know.

Q Do you have any relationship with any accounting service?
A I've got an accountant.

Q In-house?
A No, I have an outside accountant that does my taxes for me.

Q Do you have an outside accountant who does accounting services for your clients' funds?
A No.

Q Does Columbia State Bank do that for you?
A No.

Q Do you do that in-house?
A I have a separate company that does that accounting, yes.

Q What's that company called?
A SeaTac Systems, Inc.

Q When was that corporation created?
A '86, '87.

Q What business is that entity in?
A It provides computer services and accounting services.

Q Who owns SeaTac Systems, Inc.?
A My wife and I.

Q And how many employees does SeaTac Systems, Inc. currently have?
A My wife and I.

Q What, if any, contractual agreements are in place currently between SeaTac Systems, Inc. and SeaTac Escrow?
A SeaTac Systems provides trust accounting services for SeaTac Escrow on their trust account, SeaTac Systems owns the computers that SeaTac Escrow operates on.

Q Are there written contractual agreements between the two entities?

A Well we have the contractual agreements through Columbia Bank that describe how SeaTac Systems will provide the accounting work.

Q Did SeaTac Systems provide services for any entities or persons other than SeaTac Escrow?
A Not currently. I've at times thought about promoting that service for other companies but I've never obtained any other clients other than SeaTac Escrow. I had looked into providing document preparation for some companies, for some mortgage companies at one time and it never came off.

Q So if I understand this correctly there is an agreement between Columbia State Bank and SeaTac Systems and there is an agreement between Columbia State Bank and SeaTac Escrow but there isn't an agreement between SeaTac Systems and SeaTac Escrow?

A At this point there isn't a written one, no. If I was providing that service for another company obviously I would have something in writing, since I'm talking to myself I figure I can understand what I'm saying to myself.

Q Did SeaTac Escrow have a similar contract with Key Bank as it now has with Columbia?
A Yes.

(Exhibit No. 1 - 2 marked)

Q Mr. Daugs, could you identify Exhibit Nos. 1 and 2 for us?
A This is the agreement with the bank for SeaTac Escrow and Exhibit No. 2 is the agreement with the bank for SeaTac Systems.

Q Are those the most current versions of those contracts?
A Yes.

Q Were there previously any different versions of the agreements between SeaTac Escrow and the bank or between the bank and SeaTac Systems?
A No.

Q As far as you know does Exhibit No. 1 set forth all the terms of the business relationship between the bank and SeaTac Escrow?
A Yes.

Q As far as you know does Exhibit No. 2 set forth all the terms of the agreement between SeaTac Systems and Columbia Bank?
A Yes.

Q Since entering these agreements has there ever been a time when you did not have a sufficient average balance to accumulate enough credits to pay for the accounting services provided by SeaTac Systems?
A No, not at this -- under the current situation. There was a time prior, in my prior association where when the interest rates were terribly low back aways, yes, I was paying -- SeaTac Escrow was paying fees because there was not enough earnings allowance there.

* * *

Pages 36-39

Q Into the IOLTA trust account?
A No.

Q Which account?
A The SeaTac Escrow trust account.

Q Is that an interest earning account?
A No, it's a non-interest bearing account.

Q And when you get the funds from the bank loaning the money to the purchaser what do you do with those funds?
A Deposit them into the non-interest bearing SeaTac Escrow trust account.

Q Under what circumstances do you deposit funds into the IOLTA account?
A At this point never.

Q Have you ever put funds into the IOLTA account?
A No.

Q Why not?
A That's why we are here.

Q What fees does Seattle Escrow charge in a generic case for the closing on a residential real estate transaction?
A I don't know, I don't know what Seattle Escrow does.

Q I'm sorry, SeaTac Escrow.
A What fees?

Q Yes.
A We charge one fee.

Q What is that fee?
A It's dependent upon sales price.

Q How is it calculated?
A It's a $10,000 sliding scale with a minimum of $350.

Q How large a transaction does it have to be to exceed the $350 fee?

A To exceed, I didn't bring a rate chart. I'm thinking, I believe - I think the first break is $10,000, at $10,000.

Q So a transaction for more than $10,000?
A It would go up.

Q It would go up from $350?
A Right.

Q What's the increment for each $10,000 additional sale price?
A It's not a fixed increment. Basically, let's see, I'm trying to think how -- I believe its for the most part ten -- $10 -- $10 or $20 a transaction on every $10,000, for the most part, that's kind of the generic side, up to -- I think my chart goes to a million and then after that it's an arbitrary -- basically what I do is charge one dollar a thousand.

Q When is the last time you changed your rate structure, rate chart?
A I'm glad you asked me that, it's been August of 1993.

Q What were your rates prior to August of 1993?
A Just slightly -- slightly below that, as I recollect I think I raised -- I think I raised each category by $10 at that time.

Q And prior to August of 1993 when was the time previous to that that you altered your rate chart?

A Since we opened in '86 I believe there was one other time when I raised them twice and I tell you right now the only reason that I haven't raised them since '93 is because there is no way that I can stay in the marketplace because competition is very, very severe out there.

Q How do you decide at what level to set your rates?
A Ideally, okay, ideally I anticipate-- the last time I did this, okay, I anticipated a certain volume, determined to calculate my expenses and then put a little profit on top of it. And there are a lot of factors that go into that, employees, the amount of work that you can get out of an employee, the cost of that employee, and that's kind of the role that I go through when I try to determine that. However the market out there has eliminated that factor of being able to sit down and put it on a piece of paper and say, okay, I'm going to do this amount of business and when I do this amount of business I'm going to have that much profit. You have to throw that out the window and fight the competition is what is going on, okay, and that competition is a lot of factors, not just independent companies, independent companies are not my competition.

Q Who do you view as your competition?
A The major competition is title companies, and of course the next one are the mortgage companies themselves.

* * *

Q Does the purchaser who deposited funds with you receive any benefit for the earnings credit created by their short term deposit of funds?
A Sure, it holds the cost down.

Q How is that?
A Well if that offset of those bank charges, accounting charges was- - if that was not offset against those earnings allowances I would have to pass that cost on to the customer or go bankrupt.

Q How much profit did you make last year, SeaTac, how much profit did SeaTac Escrow make in profit?
A Gee, I was just looking at that, I think it was-- it's a subchapter S and I think it was-- the profit I think was like $35,000, do you want to know the year before?

Q Sure.
A Zero.

Q Did you lose any money?
A Didn't make a dime.

Q Did you draw a salary as one of the costs of SeaTac Escrow's business?
A Yes.

Q What was your salary last year?
A $30,000.

* * *

Q Did you pass that expense on to your clients in any way?

A No, I didn't adjust, no, I've never-- see, I have a different concept than a lot of people do, okay, I figure I provide a service for one fee and that's an all inclusive fee. I don't charge courier fees, I don't charge Federal Express fees, I don't charge any fees. I just charge one fee, and so at that time that was suck it up and eat it, you know. And that would be the situation if it was in reverse now-- if it was for any extended period of time I obviously would have to increase my rates or get out of the business.

Q Why do you need the accounting services provided by SeaTac Systems?

A It's a requirement that I keep-- it's under 18.44, it's a requirement that I keep in my custodial-- SeaTac Escrow in its custodial position as the holder of those funds in trust for the client is required to be able to identify those client's funds at any time and that's the service that SeaTac Systems provides.

* * *

Pages 62-64

Q So as far as you're concerned your relationship, your obligations to your clients is driven by what's set forth in the purchase and sale agreement?

A That's correct, that's what 18.44 says.

Q Have you ever been presented with a purchase and sale agreement in which you were instructed to deposit funds into an IOLTA account?

A No.

Q Have you ever been presented with a purchase and sale agreement where you were instructed specifically not to put the money into an IOLTA account?

A No.

Q Does the binder have certain disclosures in it that provide the clients discuss at all the earning credits system that you have?

A No, that's just one of those undisclosed benefits that they get.

Q What other undisclosed benefits, to use your words, does the customer get?

A Frequently Federal Express fees, courier fees, delivery fees, timely handling of documentation, those are all undisclosed benefits, sometimes we wave the flag, sometimes we don't. They get a friendly smile when they come in the door, they get an escrow officer that cares about their needs, those are all the undisclosed benefits, you don't always get that when you walk into a place but that's part of our reputation. I'm beating my own drum now, okay.

Q I understand that. Have you ever in your ten plus years experience doing this have you ever had clients put limitations on where they wanted their funds being held by you to be deposited?

A No.

Q In the ten plus years you've been doing this have you ever had a client communicate to you any limitations on what use they wanted their funds to be put?
A No.

MR. SAMP: Just to clarify when you're talking about limitations on where to be deposited you meant the name of the bank as opposed to whether it should be an interest bearing or a non-interest bearing account.
MR. GELLERT: Would your read back the last two questions. (Reporter reads back)

A My interpretation was the institution, that's what I thought you meant, institution.

Q Have you had any clients communicate to you opposition to their funds being deposited in an IOLTA account?
A No, because it's not a discussion I have with my customers.

Q Have you ever had any customers ask you whether their funds were being placed in an IOLTA account?
A No.

Q Do you know whether any of your clients would have opposed it if you had put their funds into an IOLTA account?
A Not having discussed the situation with any of my customers how could I know.

Q I just wanted to make sure.

Exhibit 5 to Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
PETITIONER L. DIAN MAXWELL
October 16, 1997

Page 6 of Deposition Transcript

Q Also at Edmonds?
A Also at various community colleges, Shoreline, Bellevue Community College, North Seattle.

Q Did you complete the paralegal course?
A No, I did not.

Q Where are you currently employed?
A At Pacific Northwest Title Company of Washington.

Q That used to be Stewart Title?
A Correct.

Q How long have you been employed by Stewart Title and then Pacific Northwest Title?
A My hire date was 2/1/85.

Q What was your initial position there?
A Assistant escrow manager, escrow closer.

Q And you've received promotions from time to time over the last 12 years?
A Yes.

Q What's your current position?

A Executive vice-president.

Q For how long have you been executive vice-president?
A Approximately five years.

* * *

Page 9

A I surrendered it at that time to the Department of Licensing when I became employed at a title company.

Q Was Rainier Financial Services a title company?
A No.

Q So you surrendered it sometime around February of 1985?
A Yes, I actually don't remember, I think you can keep it— they keep it on inactive for like two years but it was turned in to the Department of Licensing.

Q Have you ever held any other licenses?
A Yes.

Q Which?
A I held a Limited Practice Officer certificate.

Q During what period did you hold that certificate?
A 1984 to November 30, 1996.

Q And you surrendered your license or certificate to be an LPO on about November 30, 1996?
A Yes.

Q Any other licenses that you've ever held?
A I'm a licensed notary public.
Q For what period of time have you been a licensed notary public?
A 1978 to current.

* * *

Page 18

MR. BRAIN: I'm not going to object but do you mean generically or individually?
Q Generically at this point.
MR. BRAIN: That might be a little easier for her to answer.
A I don't believe I personally have any clients.

Q You work for clients of Pacific Northwest Title?
A Yes.

Q Who are those clients for whom you work?
A They are principals to a written agreement, most commonly referred to as purchase and sale agreement, i.e., buyers and sellers of real estate or personal property. They are borrowers of funds from lending sources as well.

Q By that do you mean that some of those clients are not buyers or sellers but also include people who own property that are trying to get financing on that property?
A Restructuring of debt on that property, that's correct.

Q Currently about what percentage of your employer's clients are people seeking restructuring of debt on their property?
A The current economic times I would say 40 percent of our transactions are that type.

* * *

Pages 21-26

Q Is there a fixed scale for fees in commercial transactions?
A No.

Q Are you personally in charge of deciding what fee will be charged on a commercial transaction that you are working on?
A For the most part, yes.

Q How do you go about setting a fee in a commercial transaction?
A By analyzing the contract between the parties, discussions with their legal counsel, and an estimate of my time involvement.

Q How does the pricing of the property play a role in setting the fee?
A It's a standard that has existed among the industry and the state of Washington to set a minimum fee structure based on either the purchase price of the real or personal property or the loan amount with respect to restructuring of debt.

Q How are fees charged by Pacific Northwest Title determined for residential transactions?

A They are determined by the competitive marketplace and current economic conditions of the area.

Q What are the current fees charged by Pacific Northwest Title for closing a residential transaction?
A It's based on sales price, it's a variable.

Q A sliding scale?
A A sliding scale based on price.

Q What's the minimum?
A I think $500, total escrow fee.

Q Is that broken down at all?
A It's traditionally split between the purchaser and seller of a sale transaction, 50/50, which is pursuant to their written contract.

Q But are the elements of the $500 total broken down at all?
A No.

Q Does that include title insurance?
A No.

Q What does that fee go toward?
A The cost of overhead to operate the escrow division and hopefully profit.

Q What do the parties to the purchase and sale agreement get for the payment of the escrow fee?
A They are provided with a neutral third party to hold documents, funds. They are provided with the

coordination of a neutral third party to clear matters for which are objected to in a title insurance commitment. They are provided with closing statements which reflects costs, third party charges and appropriate prorations between the parties. They are provided with a safe harbor, the deposit of their funds necessary to convey ownership and to disburse proceeds to the owner, and they are provided a guarantee that those funds are used to pay off liens and obtain releases to clear the title to the property being conveyed. They are provided the service of producing recording and policy instructions pursuant to third party instructions or escrow instructions to be forwarded to the title company to record the instruments and anything else that the parties may want.

Q When you say "anything else the parties may want", you mean anything else that the parties included in the purchase and sale agreement as instructions to you?
A That's correct, or mutually-- or subsequently mutually agreed to do, that would be a duty of mine to follow through and see that it is done.

Q Do you enter or does Pacific Northwest Title enter a written agreement with the parties to the purchase and sale agreement?
A Yes.

Q What are those agreements usually called?
A Joint escrow instructions.

Q At what dollar value does a real estate transaction get charged more than the $500 current minimum?

A We have a published minimum fee schedule rate.

Q You don't recall sitting here today at what point it gets above that number?
A I do not.
Q When is the last time Pacific Northwest Title changed its fee structures for residential transactions?
MR. BRAIN: I presume you mean escrow fee structures as opposed to title structures.
Q We'll start there, yes.
A September, 1997.

Q At that time did you increase or decrease the rates?
A We decreased them.

Q Why?
A Comparative analysis of the rates in the industry.

Q And when was the time previous to that that Pacific Northwest Title or its predecessor, Stewart Title-- when was the name changed?
A It became effective January 1st, 1997.

Q When was the time most recently prior to September '97 that your employer changed its rates for escrow closing fees?
A To the best of my current knowledge there was a rate change in 1996.

Q Was that an increase or decrease, do you remember?
A That was an increase.

Q Why were rates increased at that point?

A Current competitive analysis of the marketplace and the industry at the time.

Q Do you know whether the recent decrease in rates has put the rates at a level that they were prior to the increase in 1996?
A Would you repeat that question.

Q You said the rates increased at some point in '96 but recently in September of '97 they decreased. I was wondering whether the decrease now has the rates back to a level at or below where they were prior to the 1996 increase.
A For the most part they are back to what they were before the increase. There may be a category, price category that's $2 different but for the most part it was a rescinding of the increase.

Q Do you recall when the previous rate change prior to the 1996 increase was?
A I believe it was 1993.

Q Was that an increase or decrease?
A I don't remember.

Q Was that again as a result of the analysis of your competitors' pricing?
A Yes.

Q Do you charge a different escrow fee depending on whether or not Pacific Northwest Title is going to be underwriting the title insurance?
A No.

Q Do you do escrow closings and transactions where Pacific Northwest Title is not going to be the title insurance company?
A Yes.

Q Is that done very often?
A No. I need to clarify.

Q Okay.

* * *

Pages 30-36

Q With which financial institution is that account currently?
A Seattle First National Bank.

Q I take it from seeing some documents that Pacific Northwest Title no longer has any LPOs in its employment, is that correct?
A That's correct.

Q While Pacific Northwest Title did still have LPOs in its employment did it have any other trust accounts other than the dedicated escrow trust accounts that you've already referenced?
A I don't remember the structure. When I was an LPO and IOLTA became effective there was an IOLTA trust account established wherein I, as well as the other limited practice officers employed by our company, were on that account. Whether or not the company was the owner of that account or just an addressee of that account I don't remember.

Q When IOLTA became effective to LPOs in the passage of APR 12.1, did at any time you leave your employment of Stewart Title and Pacific Northwest Title?
A No.

Q If I understand correctly you think that the IOLTA trust account may have been set up in such a way that it was an account essentially owned by the LPOs that worked for Pacific Northwest Title?
A No, it's very difficult to explain. There was published, I believe, and I don't even know from where, either the Limited Practice Board or copies of documents from your organization that you represent, a mechanism wherein there could be an umbrella IOLTA trust account as opposed to every LPO being required to have their own trust account. So when it became effective in '95, without rules and regulations or structure in existence, for cost effectiveness we established an umbrella IOLTA trust account as opposed to 26 IOLTA trust accounts. For protection of the consumers' money general accounting principles were applied wherein the company's accounting department was responsible for the bank reconciliations for review, so where I as an LPO had no control over bank reconciliations, et cetera, I was singularly responsible for placing funds into the IOLTA account and removing it. And the officers of the corporation as far as non-escrow officers but corporate officers in the accounting department did not have the authority to go in and move money. They were, the cross check, the gap cross check, they did the reconciliations, they worked with SeaFirst, a different

division of SeaFirst for IOLTA on the reconciliation of that account.

Q Maybe that answers my next question, the IOLTA trust account was also with SeaFirst?
A Yes.

Q Does that IOLTA trust account still exist?
A I don't know.

Q On the non-IOLTA account, the dedicated trust account that you referenced before, was there any agreement with the bank in place to receive what I've seen referred to as earnings credits?
A To whom?

Q To anybody.
A I have no direct knowledge. It is my impression that there was an agreement between a subsidiary of the holding company and the bank with respect to earnings credits.

Q When you said the holding company, who's the holding company?
A It's the parent company of Pacific Northwest Title of Washington, Inc.

Q What's the holding company's name?
A Pacific Northwest Title Holding Company.

Q What's the name of the subsidiary that you believe may have had that agreement with the bank?
A Title Optics, Inc.

Q Have you ever seen any contracts between Title Optics, Inc. and SeaFirst?
A No.

MR. GELLERT: Off the record. (Brief recess taken)
MR. GELLERT: Back on the record.

Q Prior to the whole change-- when Stewart Title was still the entity was there also a holding company and then the title company?
A Yes.

Q And at that time did Title Optics exist?
A Yes.

Q Was Title Optics at that time a subsidiary of the holding company?
A Yes.

Q And at that time was there also to your understanding some type of agreement between SeaFirst Bank and Title Optics whereby earnings credits or something to that effect was earned on the trust account?
A I believe so, I have no evidence to that effect.

Q Do you have any knowledge of the terms of any agreement between SeaFirst and Title Optics?
A No.

Q Do you know whether any earnings credits were available to be earned on the IOLTA trust account that was established for SeaFirst?
A No.

Q You don't know one way or the other?
A I don't know one way or the other.

Q Do you know what rate of interest SeaFirst gave on the IOLTA trust account?
A No.

Q Who do you believe would be most knowledgeable about the relationship with Seafirst with respect to the IOLTA trust account?
A The chief financial operations manager- - financial officer, Jim Gill, G - i - l - l .

Q And Mr. Gill also would be the one most knowledgeable concerning the relationship between SeaFirst and Title Optics?
A Yes.

Q When you did operate as an LPO employed by Pacific Northwest Title or Stewart Title did you have any clients of your own as opposed to clients of your employer?
A I need you to define your term clients I guess.

Q Do you consider that you had any contractual agreements personally with any of those that you were closing transactions for while employed by Pacific Northwest Title or Stewart Title?
A No. I'm having a hard time with the structure of your question because I have a following of people who like to use me for closing their escrow transactions because of the service and the expertise I feel they feel that I give them in order to close the transaction well and

quickly and correctly, but it's not contractual, it is a business relationship that exists as long as I continue to do my job well.

Q Your job well as an employee of?
A As an escrow officer.

Q As an escrow officer employed by Pacific Northwest Title?
A Yes.

Q Following the passage of APR 12.1 while you were still an LPO were any additional fees charged to clients on the closing of a residential transaction?
A Yes.

Q What were those fees?
A The clients to the transaction were assessed a fee that we called a trust accounting fee.

Q When did Pacific Northwest Title first charge a trust accounting fee?
A That fee was initiated as a result of an analysis of the cost of maintenance of an IOLTA trust account.

Q Who made that analysis?
A The company.

Q Who at the company, do you know?
A Well Jim Gill was involved, Pete Murphy, who was the CEO of the holding company, I was involved, my assistant manager was involved.

Q Who was that?
A Cheryl Ford-- involved in the meeting. There may have been others present, I don't remember.

Q And when was that process of deciding what the cost of maintenance of an IOLTA account, when did that take place, that process?
A It would have been in '95, 1995, the effective date of the IOLTA 12.1.

* * *

Pages 41-42

Q Are you aware of any other activities done as part of analyzing what the cost of maintaining the IOLTA account?
A No.

Q When did Pacific Northwest Title first start charging a trust accounting fee?
A To the best of my recollection that was instituted in the fourth quarter of 1995, it would have been at the same time that the IOLTA trust account was established and that IOLTA became applicable to LPOs, so don't hold me to the date but it would have been all connected.

Q And was the trust accounting fee a flat fee regardless of the dollars involved in a transaction?
A Yes, it was.

Q What was the flat fee initially?
A $50 per file split 50/50 between the parties.

Q Are trust accounting fees still charged on any transactions?
A No.

Q Have they been charged on any transactions since November of 1996?
A No.

Q At any time between when they were first being charged and November of 1996 did the flat fee change from $50?
A No.

Q Did you ever waive the trust accounting fee?
A We may have.

Q Under what circumstances?
A Refusal of clients to pay.

Q Did any of your clients refuse to pay?
A Yes.

Q How many?
A Minimal.

Q Can you put a number on it?
A Under ten.

Q How many of your clients or clients of Pacific Northwest Title for whose accounts you were working did you charge a trust accounting fee?

A Any file in which I prepared legal documents necessary to close the escrow transaction they were charged the trust accounting fee.

Q Can you tell me how many that was?
A I cannot.

Q Was it more than 100?
A Yes.

* * *

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Q Who was that counsel, in-house counsel?
A No.

Q Who was the lawyer?
A Foster Pepper.

Q Was opposition by clients or prospective clients to paying the trust accounting fee a consideration in a decision to terminate having LPOs at Pacific Northwest Title?
A No.

Q Currently now that there aren't LPOs at Pacific Northwest Title for residential transactions who prepares the legal documents?
A Parties to the transaction select their own counsel and the documents are submitted into escrow.

Q Do you play any role in assisting the parties to select counsel?

A Yes.

Q What role do you play?
A We advise them of two law firms that agree to prepare documents for a fee, we advise them that they can also prepare their own documents. We advise them that they have their own legal representation their own attorneys prepare them.

* * *

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Q I understand, okay. Do you know whether Ryan Swanson is employing LPOs to do this work?
A I do not.

Q Do you know whether Pacific Northwest Title considered having LPOs as independent contractors do it?
A We did not. We can't be independent contractors, that was a major, major discussion point in the creation of APR 12. The fear was that we were limited, extremely limited in our duties and authority and could not quote-unquote hang a shingle on the corner as a limited practice officer. It had to be in conjunction with an escrow transaction in which we were closing a real personal property transaction.

Q I take it, correct me if I'm wrong, that now that Pacific Northwest Title does not have LPOs funds being held by Pacific Northwest Title as part of a residential real estate transaction they are put into what you referred to as the dedicated escrow account?
A That's correct.

Q Does that account earn interest, I take it not?
A No.

* * *

Pages 57-58

Q The money isn't considered available to SeaFirst to earn interest?
A Exactly.

Q While you still did have your LPO license and were depositing funds into the IOLTA account did you ever have any clients communicate to you opposition to their funds being placed into the IOLTA account?
A I know I remember one.

Q Who was that?
A Mr. Bob Parks.

Q P-a-r-k-s?
A Yes.

Q When was that?
A During the period that it was applicable, I don't remember the exact date, he's with TRF Pacific.

Q Was he a party to a residential real estate transaction?
A No.

Q Was TRF Pacific a party to a residential real estate transaction?
A No.

Q In what context was he a client of yours?
A He was a party to a commercial real estate closing transaction.

Q I thought that there would be no circumstances where funds were being placed into an IOLTA account in a commercial transaction, am I mistaken?
A You're mistaken.

Q Were you acting as an LPO in a commercial transaction on behalf of Bob Parks or TRF Pacific?
A Yes, I was.

Q Was he the buyer or seller in that transaction?
A He was the buyer, his entity was the buyer.

Q Did he deposit funds with you pending a closing of the transaction?
A Yes.

Q Were those funds deposited into an IOLTA account?
A No.

Q Where were they deposited?
A He sent me instructions to invest the funds.

Q Into what type of account?
A An interest bearing account.

Q Did you charge him for the cost of opening and closing or maintaining an interest bearing account?
A No.

* * *

Pages 66-68

A Do I believe that Pacific Northwest Title?

Q Receives any benefit from the fact that SeaFirst Bank gives earnings credits on the trust account.
A I believe that the company does receive benefits which benefits them, the customer of the escrow files, because the benefits offset operating costs to maintain the trust account in the past, for example, wire fees, check charges, deposit charges, those earnings were offset and those costs were costs of overhead of operating an escrow function, so I think it's a pass-through-- it's a pass-through down to the customer.

Q Does the closing statement that the customer receives reflect any of those quote pass-throughs?
A No. Indirectly it does because it reflects an escrow fee that is lower than it would be, or line items that aren't there that would be there if we weren't-- if the company wasn't getting, you know, the offsets in the maintenance of the account, but visually --

Q I'm confused I thought the escrow fees were set by market force, not by costs.
A I said that a major factor was competitive marketplace, cost of overhead certainly, if I forgot to mention that it should be in there, cost of overhead.

Q It's speculative on your part, isn't it, that if earnings credits weren't earned that the fees to the customer would increase?

MR. BRAIN: I object to the form of the question. I don't know what you mean by fees, only the escrow fees or other things. I want a clear question.

A Yes, I don't understand, I mean.

Q Have you done any economic study yourself as to what would be the effect on fees, escrow fees charged in Washington state if no banks were allowed to pay earnings credits on trust accounts?

A I have not done any formal economic studies with respect to your question.

Q Do you know of any such studies?

A I do not know of any such studies.

Q Do you know in fact that fees in Washington state for closing escrows would increase if banks were not allowed to award earnings credits on trust accounts?

A. I do not know in fact.

Q Does Pacific Northwest Title charge any line items on an escrow closing other than-- or has it other than the trust accounting fee that was charged if funds went into an IOLTA account?

A We do charge for courier and express fees.

Q Any other line items that are changed?

A Not consistently.

Q Are others sometimes charged?

A If it's applicable to the escrow file there may be additional charges.

Q Can you think of some that are sometimes charged?

A Yes, if we are asked to pay off excessive numbers of credit cards we will charge a check charge for that service.

Q Any others?

A If there is an RIC 1031 exchange we will add a charge to the exchanger's closing statement for working with the exchange facilitator. Those are what come to mind at the moment.

Exhibit 6 to Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
GREGORY HAYES
October 16, 1997

Pages 8-15 of Deposition Transcript

Q As far as you know does your membership in the Washington Legal Foundation provide you any benefits?
A It provides avenues for methods of resulting-- getting a result, if you will, on constitutional issues. I find that is a huge benefit.

Q When did you first learn of the IOLTA program?
A It was after the transaction in August of 1996, as I said before, when a friend of mine and I were discussing this program that existed and I verified on my documents that I was part of that program even though it was against my will.

(Exhibit No. 1 - 2 marked)

Q Take a moment and take a look at exhibits one and two to your deposition. Have you had an opportunity to look at those?
A Yes, they appear like I submitted them.

Q What are they?
A Exhibit No. 1 is the receipt for deposit on the property that was held in escrow and the second is the financial transaction that occurred to close the property.
Q Are these all the records in your possession concerning the purchase of the property?

A Yes.

Q Do you know whether Mr. Fossum has any additional documents beyond these concerning the purchase of the property?
A It is my belief that he does not. The last document that I received, this one here, the two page document, Exhibit No. 1, I received a few months after the transaction from him so that should complete all the paperwork.

Q You indicated, I think, that you confirmed by looking at these documents compliance with IOLTA, where was it that you saw that on that document?
A Exhibit No. 1 it's on the check at the bottom, IOLTA trust account.
Q What is the second page of Exhibit No. 1?
A It is the escrow trust receipt that we put $2,000 down on the property at Fidelity National Title, deposited that $2,000 into an IOLTA trust account.

Q Is Sandra Fossum a party to the real estate transaction?
A She was like my wife quit deeded out but both my wife and Sandra were there for the closing and we quit deeded them, you'll find that in Exhibit No. 2.

Q If I understand the second page of this document correctly then Fidelity National Title Company of Washington received from the Fossums $2,000 as the earnest money deposit on the property that you and Mr. Fossum were purchasing?
A The check is in their name, yes. I gave Roger $1,000 to cover my half of the purchase.

Q Was that money delivered to Fidelity National Title Company on August 14, 1996?
A To the best of my knowledge it was.

Q Is there any real estate broker involved in the purchase of this property?
A No.

Q When did the transaction close?
A I believe it was August 30th, or the beginning of September, one of those two days. Without looking at the document I believe it was August 30th that the title transferred.

Q Were additional funds beyond the $2,000 earnest money agreement deposit also delivered to Fidelity National Title Company?
A There was approximately-- the answer to your question is yes.

Q And when was the next delivery of funds made?
A I believe on the 28th of August it was $12,793.32.

Q You're referring to the second page of Exhibit No. 2?
A Yes, balance needed to close.

Q Did Mr. Beck finance?
A Yes, he did.

Q So he lent you in essence $22,500?
A Yes, there is a deed of trust and that's been closed.

Q Has that been paid now?

A Yes.

Q When was that paid off?
A At the end of this past August, I couldn't give you the exact date without looking at my receipts.

Q How did you choose to use Fidelity National Title Company?
A I would have to say it was either my partner that made the decision or Kevin Beck and I was told where to go and how much to bring.

Q Do you know any factors in how that decision was made about which title company to use?
A I believe it was random, something close to the location.

Q Do you know whether the price of the fees to be charged was considered?
A They were not.

Q In what form was the balance needed to close delivered to Fidelity National Title Company?
A You're referring to the $12,000, and there were two checks, one from Roger Fossum and one from myself, cashier's checks.

Q And do you know where Fidelity National Title Company deposited those funds?
A From the documents it appears they deposited them in SeaFirst.

Q What are you referencing there for that information?
A The fifth page Exhibit No. 2.

Q The document that is entitled notice concerning collected funds and disbursement of funds?
A Yes.

Q Do you know whether that is an IOLTA account?
A I cannot say that. I make the assumption that it is since the receipt states that it's going into an IOLTA account on Exhibit No. 1.

Q Exhibit No. 1 references the $2,000?
A Deposit.

Q Earnest money deposit, correct?
A Right.

Q And this fifth page of Exhibit No. 2 is referencing the additional funds, isn't it?
A Yes, I would agree.

Q Have you seen anything else that would indicate whether or not this SeaFirst bank account referenced here was an IOLTA account or not?
A No, I have not seen that.

Q Did you expect to earn interest on your earnest money deposit being held by Fidelity National Title Company?
A Not directly.

Q Did you expect to indirectly receive interest on that deposit?
A I indirectly expected that in exchange for an escrow account through the bank the cost would not be forwarded to the title company. The bottom line is the

consumer is having to pay because everybody's business has to make money. You can't run a business and lose money.

Q For very long at least.
A Three years.

Q I'm not sure I completely understood what your expectation was. You expected that the title company was going to receive the interest?
A Let me clarify.

Q Okay.
A I believe, this is my belief now as how business worked previous to the IOLTA system, that in exchange for an escrow account the bank would provide that service for free, to the escrow company, therefore the consumer that deposits the money does not get charged. As a result the bank no longer can make that money, the escrow company has to back charge or pay for that account, which in turn the consumer has to reimburse the escrow account at an escalated fee. It's basic business.

Q Do you know how Fidelity National Title Company sets its fees?
A No, I do not.

Q Have you chosen an escrow closing company for the pending sale of the property?
A It will be the same because the fees will be reduced because of the title search costs.

Q So you'll be using Fidelity National Title again?
A Yes.

Q Do you know how it sets the fees it's going to charge you for the closing of the sale of the property?
A I don't know how exactly their charges are set up, if that's what you're asking, what percentages they base it on. It also depends on the type of loan the buyer brings to the table, whether it's FHA or VA or conventional. That's about the extent of my knowledge.

Q Do you know whether the fees charged by Fidelity National Title Company included any line item for the cost of complying with IOLTA?
A I do not see a breakdown of that particular line item in the documents.

Q Have you ever seen any such line item breakdown?
A No.

Q Is it Sharon Brinley who is the escrow closing officer that purchased the property?
A Yes.

Q Will she be the escrow closing officer for the sale of the property?
A I do not know that at this time.

Q Have you ever heard of the term earning credits?
A I've heard of it, yes.

Q Do you know whether SeaFirst Bank was providing Fidelity National Title Company earnings credits on any trust accounts?
A I don't know that, that's beyond the scope of my knowledge.

* * *

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Q And she was an employee of that entity?
A I hope so.

Q That was your understanding?
A It is. We haven't got the deed yet, so maybe not.

Q What specifically do you believe has been taken from you as a result of IOLTA?
A Well there are a couple of issues. One, I'm not having a choice to receive the interest from my withholdings and having those funds used for organizations that I may not agree with or agree or disagree, generally their causes. And two is the decision that the money is being taken against my will, if you will, so it's basically a first and fifth amendment issue in my opinion but I'm not an expert at law.

Q Have you taken any action to avoid having the funds for the pending sale of your property put into an IOLTA account?
A My understanding of the regulation is that the officer does not have that choice by law, it must go-- at least the transactions that I'm dealing with, small funds must go into an IOLTA account.

* * *

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Q . . . in particular are you seeking reimbursement?
A It would be the portion of the interest that would be due on any money held in the IOLTA account, from this transaction or any future transactions.

Q Why do you believe you are owed that interest?
A Because I believe that the cost of doing business with an escrow company in order to close the property that they have to increase their fees and I have to pay them an increased fee to cover that cost of the IOLTA.

Q How much more do you think you pay? How much more do you think you've paid as a result of IOLTA than you would have had to pay?
A I don't have any idea, I'm not privy to that information, I don't know what the agreements are between escrows and banks.

Q But you believe you've paid more than you should have?
A As a result of the IOLTA, yes.

Q Do you know how you're going to place a value on that for purposes of claiming reimbursement?
A At this current time I do not.

* * *

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A Whatever money that's gone into the IOLTA supports those funds directly or indirectly.

Q So if you haven't had any property taken you haven't been forced to speak in support of those causes, is that a fair characterization?
MR. SAMP: I think that's a little bit hypothetical, I think what he said was the taking of his property is what he considered his speech.

Q Is that your understanding of the response?
A Yes.

MR. GELLERT: I don't have anything more, thanks.
MS. HART: No questions.

Exhibit 7 to Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
PETITIONER ALLEN D. BROWN
October 20, 1997

Pages 10-11 of Deposition Transcript

Q Does Brown-McMillen Real Estate have any contractual relationships with any escrow companies?
A No.

Q Does Brown-McMillen Real Estate have any informal relationships with any escrow companies?
A You're asking me if I have an agreement to do business with them?

Q Or some referral agreement or anything like that.
A No, I'm stockholder of two title companies which in turn have escrow services but they are not -- there are no contractual agreements.

Q Which title companies do you have stock ownership in?
A I have stock ownership in Land Title, which is Mt. Vernon Abstract and First American Title in Mt. Vernon.

Q First American Title what?
A First American Title of Mt. Vernon.

Q Do you hold any board positions in either of those title companies?

A I serve on the board of Land Title Company, I have for ten years or more and presently.

Q Have you held any officer position in either of those companies?
A I'm presently the chairman or the president of the Land Title Company.

Q How long have you held that position?
A About four years.

Q Do both of those title companies have escrow departments?
A Yes, they do.

Q Do you know whether either of those companies has any limited practice officers?
A I know Land Title does.

Q Do you know whether First American does?
A Well I'm sure they do but I couldn't guarantee that.

Q Do you believe they do from the nature of their business?
A I know they do because we've closed transactions there with their LPOs, so I guess I do know.

Q Do you know whether you're making any claim in this lawsuit that you've been damaged as a result of any impact of the IOLTA program on either of those title companies?
A Am I making that claim?

Q Right.

* * *

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Q What did you and Mr. Ronhaar specifically discuss with respect to the loss of these credits?

A I believe probably one of the conversations would have been that it's going to show up on our profit and loss for the title company itself if we went back to paying these bills. And then as myself as-- we could go into that a little deeper, I primarily bought and sold, you know, two to eight transactions a year I suppose where my funds were-- I had no control over where those were going so that was part of the conversation too.

Q As a result of your discussions with Mr. Ronhaar was there any decision about what to do with respect to this loss of earnings credits?

A I think-- I believe this at some point was presented to the board and the board directed Mr. Ronhaar to see if we couldn't renegotiate with Skagit State and Whidbey Bank to at least get a part of these earned credits that we were getting, and that's been the case, we have been . . .

* * *

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Q When you do that did you do it individually or did your real estate company take title?

A I take title to them in Allen Brown doing business as Brown-McMillen, so it's the real estate company.

Q So your real estate company is not incorporated?

A No.

Q Is it a partnership?

A A sole proprietorship, it used to be a partnership. I bought my partner out four years ago and switched it back.

Q In the Anderson transaction was there any earnest money agreement deposit, do you know?

A I don't know, when I purchased there were funds deposited but I don't know about earnest money.

(Exhibit No. 1 marked)

Q Handing you Exhibit No. 1 to your deposition can you tell me what that is?

A That's the purchase of the Anderson property.

Q That's the closing statement issued by Land Title Company?

A Yes.

Q Do you possess any other documents with respect to the closing of that transaction?

A The normal documents, deed and escrow papers, but

* * *

Pages 35-36

Q Now in an interrogatory answer in this case you responded that you estimate that $4.96 in interest was earned on your funds in this Anderson transaction, correct?

A I think that's true, that we kind of made an estimate on.

Q How did you go about making that estimate?
A It probably was based on one percent of the $90,000 that we had, the $90,521 in there.

Q For how long was that money there?
A I think in this particular transaction it was only there two days.

Q Why did you choose one percent as the interest rate by which to calculate the estimated interest?
A Well because I think that's what Skagit State is paying the IOLTA account right now and the balance is going to earnings credits.

Q Are you saying that without IOLTA in place you would have earned $4.96 on this transaction?
A Without IOLTA in place I may not have earned anything but it would have been earned in the sense of earning credits for the title company in this case.

Q And how as a user of Land Title or customer of Land Title Company did you benefit, if at all, from Skagit County Bank awarding earnings credits?
A Well as I stated earlier I think it's a benefit to the customers and probably keeping costs down in lieu of costs, in lieu of bills the bank is paying them and then that I think the benefit of that is passed on to stockholders, so I think we gained from the service provided, at the cost of service provided and I as one of the stockholders also.

Q When you resold this property in September of 1997 were the funds being held by the escrow company pending the closing put into an IOLTA account?
A I don't know that, Nick, I can't remember whether a mortgage-- a lender was involved-- a lender was involved but whether they escrowed it or not, that's what I can't remember, I'm sorry, I just deal with too many.

Q Prior to the May, 1997 Anderson transaction was your most recent transaction prior to that in November of 1995, the Cleaves-- I mean the Lees?
A The Lees, that's the one I had bought that, I think the day before the IOLTA account came into . . .

* * *

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Q Earlier you indicated that you communicated an objection to IOLTA, what's the nature of your objection?
A My objection would be that I have no control over where this interest, once it goes into the IOLTA account it may be used for services that I don't necessarily agree with, would be one of them.

Q Legal services?
A Yes, right. And knowing what I know how the money is handled in our escrow operation I think it's better if we can get earned credits for it for the title company.

Q Better for whom?
A For me as a consumer and as a stockholder.

Q Do you oppose any of the uses to which money is being used?
A In the IOLTA account?

Q Yes.
A I think I probably would if I knew for sure what it was being used for.

MR. PURCELL: Off the record.
(Brief recess taken)
MR. GELLERT: Back on the record.
* * *

Pages 43-44

Q Have you heard of others?
A I've heard of others but I have no way of verifying.

Q What others have you heard have done that?
A I don't know, I mean it's been just in conversation that I think it's been a widespread practice I think throughout the industry, but I can't-- I don't know, I can't name anybody.

Q But you understand that there are a number of financial institutions that are doing that?
A Yes, or have done it in the past.

Q In response to Interrogatory No. 11 you included the statement that, quote, the monetary value of these services to escrow depositors-- actually let me show you Interrogatory No. 11 and have you read the question and answer first.
A Okay.

Q Included in your answer there is the sentence that says, the monetary value of these services to escrow depositors can be assumed to equal the amount paid by banks to the service providers. Why do you say that?
A Well I think-- I don't want to waffle if we did that-- I think if there hadn't been some earned credits with the customers' monies that there probably would be higher escrow fees being allocated to the escrow at that time. So I think these-- I think the fees that we have been getting paid by like Skagit State has been keeping our fees down in the escrow department. And don't ask me how much but I mean I think that's what I was driving at, I think our fees would be higher.

Q That's what I'm trying to get at, you just said I don't know by how much but this statement seems to imply a dollar by dollar basis, and I'm trying to figure out why you at the time you filled out this answer you thought it was on a dollar by dollar basis?
A I don't know, Nick, I think that monetary value fluctuates with the amount of monies that we have in escrow at the time too so I'm not sure what I was thinking there.

Q Have you seen any economic studies of how escrow fees have or will change over time as a result of the loss of banks awarding earnings credits?
A No, I have not.

Q Are you aware of any such studies?
A. Studies?

Q Yes.

**DECLARATION OF KEITH LEFFLER
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

1. I am an Associate Professor of Economics at the University of Washington. I have reviewed the memorandum in support of summary judgment filed by plaintiffs and the Wheeler declaration. I am familiar with the economics of real estate transactions and the banking industry from personal experience and from my academic studies. I specialize in the analysis of competition and in determination of competitive prices.

2. Plaintiffs incorrectly base their analysis of the alleged effects of the IOLTA program on the owners of escrow funds on a presumption that both the banking markets and the escrow services markets in Washington operate like the economic stylization of a perfectly competitive market. While, of course, banks and escrow companies compete, such competition is, in fact, far from that hypothesized by the perfectly competitive construct. The very recognition of the significant transactions cost undermining the escrow companies' ability to pass on interest to their clients is itself inconsistent with a perfectly competitive market. Escrow transactions take place in a market where most buyers operate with incomplete information and deal in such transactions sporadically at best. Many companies bundle both escrow services and title insurance services such that escrow service pricing may be used to attract related business. Determination of the equilibrium pricing structure in the escrow services market is quite complex, and certainly there is no presumption that a change in banks' earnings credits policies will be passed on to escrow services' customers.

Indeed, it is my understanding that escrow fees do not vary, for example, with the amount of the earnest money held in trust.

3. Banks also do not operate in a perfectly competitive market. As any bank customer has observed, the rates and mix of services offered by banks vary substantially among the banks and among each bank's customers. The absence of perfect competition is manifest from Mr. Wheeler's observation that some banks continue "to provide some earnings credits in addition to payment of interest to the IOLTA program." (Wheeler at paragraph 8.) Even if banks have an incentive to compete to hold escrow funds that generate significant transactions cost, there is no sound reason to believe that the form of such competition will be limited to or substantially composed of earnings credits that directly impact the cost of providing escrow services. Indeed, banks entice clients with nice lunches, tickets to their luxury boxes, convenient locations, free ATM services, friendly tellers, and myriad other features that may or may not impact the costs then incurred to service an escrow company's clients.

4. It is very likely that the IOLTA program has had no effect on the prices paid by the users of escrow services. It is also theoretically possible that there has been some impact. This is not an issue that can be resolved by theory or inference. Only a careful economic analysis of the prices and structure of the prices before and after the institution of the program could demonstrate that there has in fact been some adverse impact on the clients of LPO services from the IOLTA program. Plaintiffs have not done such an analysis. Neither plaintiffs' memorandum nor Mr. Wheeler's declaration even assert that prices have

in fact gone up since the IOLTA program, much less providing any empirical support for such a conjecture.

5. Mr. Wheeler does assert that reductions in earnings credits by banks "inevitably are passed along by escrow and title companies to their customers." (Wheeler at paragraph 9.) There is no basis in economic theory for this assertion given the actual structures of the banking and escrow services markets. The only support offered by Mr. Wheeler is the fact that "[s]ome escrow companies have taken to including those [unspecified] bank charges as a separate item on closing statements . . . denominated as an 'IOLTA fee'." (At paragraph 9.) The designation of the basis for a component of a fee is of no economic substance. When buyers operate under incomplete information as to the exact costs incurred by sellers, the sellers are always testing whether they can profitably raise prices. Of course, designation of part of a price change as cost-based can minimize the buyers' incentives to search for alternative cheaper suppliers. The lack of any economic substance to the designated IOLTA fee is obvious in that it was charged to both the buyer and the seller and the amount certainly bore no relationship to any change in earnings credits from a $200 earnest money deposit.

6. Further, even if one could show the fact that the IOLTA program reduced earnings credits received by escrow companies for LPO services, and even if one could show that as a result there was an average increase in the prices paid by users of these services, there would be no reason to believe that the impact on any particular client would bear any relationship to any loss of earnings credit on the funds of that client, much less any relationship to the interest paid to the IOLTA program on that client's funds. Since the IOLTA program exists only because of the

prohibitively high costs of determining what would be the interest earnings due a particular client, it can be presumed that determining client specific impact of any change in earnings credits would be even more prohibitively costly. Therefore, in my opinion, even if all the unsupported premises of plaintiffs' theory are assumed correct, it is complete speculation to claim that any particular LPO client has been adversely impacted by the IOLTA program or has suffered any "taking."

I certify under penalty of perjury under the laws of the United States of America and of the State of Washington that the foregoing is true and correct.

DATED: December 1, 1997

/s/
Keith Leffler

EXCERPTS FROM BRIEF OF WASHINGTON STATE BAR ASSOCIATION IN SUPPORT OF PROPOSED ADMISSION TO PRACTICE RULE 12(*h*)

Filed in the Supreme Court of Washington
February 2, 1994

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E. Question 3: The Proposed Rule Imposes Requirements On Certified Closing Officers Which Are Unaffected By The Name And Signing Authority On The Employer's Trust Account.

The proposed rule imposes obligations on certified closing officers with respect to any transaction for which the officer prepares legal documents. The officer's

responsibility is to ensure that any funds deposited by the customer in connection with the transaction are deposited into an account for the benefit of the customer or the Legal Foundation. It is irrelevant whether the officer has any responsibility over accepting and disbursing funds, or any signing authority with respect to the bank account.

Certified closing officers are in the same position as lawyers. The lawyer may or may not have his or her personal IOLTA account, but the lawyer is clearly subject to an obligation that any funds deposited with the lawyer or his or her employer must be deposited in a trust account to benefit the client or the Legal Foundation. Suppose, for example, an associate in a law firm receives a settlement check made payable to the law firm, which is a professional service corporation organized pursuant to RCW ch. 18.100. (The example works equally well for any "partner" or "shareholder" who has no signing authority over the firm's trust account.) The associate may have no signing authority over the firm's trust account, and the funds may be directed to the firm, not to the individual associate. Nonetheless, the associate must ensure that those funds are deposited into an account authorized by RPC 1.14.

The certified closing officer is in exactly the same position as the associate in the hypothetical example. If the certified closing officer "practices law" for a transaction by selecting, completing, or preparing legal documents, the officer should be required to see that the funds are deposited into an account authorized under RPC 1.14.

Escrow companies, title companies, and bank/lending institutions breach their fiduciary duties as trustees whenever they receive benefits from their trust accounts. This Court should not permit certified closing officers, who

are licensed by the Court, to facilitate this breach of fiduciary duty, whether or not the officer accepts or disburses funds. Title companies, escrow companies, and banks/lending institutions act in the capacity of a trustee when they accept funds in connection with the closing of real and personal property transactions. ***Estate of Jordan v. Hartford Co.***, 120 Wn.2d 490, 501, 844 P .2d 403 (1993). A trustee is prohibited from accepting any benefit from the funds of the beneficiary: "A trustee will not be permitted to manage the affairs of his trust, or to deal with the trust property, so as to gain any advantage, either directly or indirectly for himself." ***Tucker v. Brown,*** 20 Wn.2d 740, 748, 150 P.2d 604 (1944) (quoting ***Linsley v. Strang,*** 149 Iowa 690, 126 N.W. 941, 128 N.W. 932 (1910)). The ***Restatement (Second) of Trusts*** § 170 comment *o* (1959) makes this clear: "The trustee violates his duty to the beneficiary if he accepts for himself from a third person any bonus or commission for any act done by him in connection with the administration of the trust." The reason for this rule is simple and sound – if the trustee is permitted to receive a benefit, even indirectly, he or she will be tempted to use the services of the institution paying the benefit, even if that might not be in the best interest of the beneficiary. *Id.* The Department of Licensing has recognized this principle in its regulations, providing that escrow companies "shall hold the funds in trust for the purposes of the transaction or agreement and shall not utilize such funds for the benefit of the agent or any person not entitled to such benefit." WAC 308-128E-011.

Despite these clear principles of trust law, it is acknowledged that escrow companies and title companies derive an indirect benefit from their client funds held in trust. This Court stated in its letter calling for briefs, "Both

the escrow companies and the title companies admit they receive from their banks significant economic benefits from their trust account deposits." (App. C, p. 2) Members of the Washington State Escrow Commission alluded to these benefits during a Commission discussion of the proposed rule:

> Issues concerning the product/service benefits received by escrow companies and others provided by financial institutions were raised. Automated accounting programs, computer software, and equipment were identified as typical benefits.

Washington State Escrow Commission Meeting Minutes, p.6 (9/9/93).

Certified closing officers licensed by this Court should not be permitted to facilitate a breach of trust by their employers, who clearly are deriving a benefit from their customers' funds. However inadequate the ethics of the marketplace, this Court should not countenance its own licensees' participation in this breach:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.

> (***Wendt v. Fischer,*** 243 N.Y. 439, 444) [154 N.E. 303]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgement of this court.

Tucker v. Brown, supra, 20 Wn.2d at 768-69 (quoting ***Meinhard v. Salmon***, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R 1 (1928). This Court should decline to allow certified closing officers licensed by the Court to participate in any employment arrangement by which the high standards imposed on a trustee are lowered to the level of the workaday world.

* * *

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The need is great; the Court has the power. The Association respectfully asks the Court to adopt the proposed rule without delay.

RESPECTFULLY SUBMITTED this 1st day of February, 1994.

Edwards, Sieh, Wiggins & Hathaway

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SUPPLEMENTAL STATEMENT OF AUTHORITY BY WASHINGTON STATE BAR ASSOCIATION IN SUPPORT OF PROPOSED ADMISSION TO PRACTICE RULE 12(*h*)

Filed in the Supreme Court of Washington
April 13, 1994

The Washington State Bar Association respectfully files this supplemental statement of authority.

The Association argued in its brief the impropriety of escrow and title companies deriving indirect benefits from their client funds held in trust, and the particular impropriety of the participation in these activities by closing officers certified by this Court. (Br. of WSBA, pp. 31-32) The Legal Foundation of Washington similarly argued that such practices constitute self-dealing and appear to violate regulations governing escrow companies. (Legal Foundation of Washington Br., p. 34)

On March 9, 1994, the Federal Reserve Bank of San Francisco issued an interpretation of Regulation Q (12 CFR Part 217), pointing out that such arrangements may violate banking law as well as state fiduciary law. A copy of the interpretation is attached to this supplemental statement of authority for the convenience of the Court.

RESPECTFULLY SUBMITTED this 13th day of April, 1994.

EDWARDS, SIEH, WIGGINS & HATHAWAY

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SUPREME COURT OF WASHINGTON'S IOLTA ADOPTION ORDER

June 19, 1984

[The amendments to the Code of Professional Responsibility which created an Interest on Lawyers' Trust Accounts (IOLTA) program were adopted June 19, 1984, published in the Washington Reports advance sheets July 6, 1984, and are effective January 1, 1985. In order to assist members of the Bar in the understanding and implementation of the rule changes, the complete text of the adoptive order is set forth below.]

WILLIAMS, C.J. – In December 1981, a Washington attorney petitioned this court to establish an Interest on Lawyers' Trust Accounts (IOLTA) program, to be implemented by amendments to CPR DR 9–102 of the Code of Professional Responsibility. After almost 2 years of studying the concept and various alternative means of implementing it, a proposed rule was drafted by a joint committee of the Washington State Bar Association and the Seattle-King County Bar Association. The joint draft was submitted to this court, which published it for public comment pursuant to General Rule 9. See 100 Wn.2d, Advance Sheet 8, at i (1983). The court received 531 public comments, 424 of which (80 percent) supported the proposed IOLTA program. Following the expiration of the public comment period, the court published an order calling for briefs and oral arguments on the proposed rule change, and designating the Seattle-King County Bar Association to represent the proponents of the proposed rule (hereinafter proponents) and the Walla Walla County Bar Association to represent the opponents (hereinafter opponents). See 100

Wn.2d, Advance Sheet 13, at i (1984). Oral argument was heard on May 14, 1984.

We hereby adopt the proposed amendments to CPR DR 9-102 as set forth in the order following this opinion. In so doing, we make clear that those funds available for the IOLTA program are only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client.

I.

Nearly half the states have some form of IOLTA program, *see* National IOLTA Clearinghouse, *IOLTA Update*, vol. 1, No. 3 (Winter 1984), at 11-13, as do all the Canadian provinces. The highest courts of four states have rejected IOLTA proposals. *IOLTA Update*, at 7. The Washington proposal is largely patterned after the Minnesota IOLTA program, which is a "mandatory" program in which attorneys are required to participate.

Presently, the obligations of Washington lawyers with respect to client trust funds are determined primarily by CPR DR 9-102 of the Code of Professional Responsibility and by the common law of trusts. In general, attorneys must hold client trust funds in accounts separate from their own funds, and are obligated to maintain complete records and pay the funds over to the clients or others as soon as they are entitled to receive them. *See* CPR DR 9-102. CPR DR 9-102 does not address the question of whether attorneys must invest such funds for the benefit of clients. In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the

trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account. However, when trust funds are so nominal in amount or to be held for so short a period that the amount of interest that could be earned would not justify the cost of creating separate accounts, most attorneys simply deposit the funds in a single noninterest-bearing trust checking account containing all such trust funds from all their clients. The funds in such accounts earn no interest for either the client or the attorney. The banks, in contrast, have received the interest-free use of client money.

The IOLTA program adopted by this court contains the following general requirements:

1. *All* client funds paid to any Washington lawyer or law firm must be deposited in identifiable interest-bearing trust accounts separate from any accounts containing non-trust money of the lawyer or law firm. The program is mandatory for all Washington lawyers. New CPR DR 9-102(A).

2. The new rule provides for two kinds of interest-bearing trust accounts. The first type of account bears interest to be paid, net of any transaction costs, to the client. This type of account may be in the form of either separate accounts for each client or a single pooled account with subaccounting to determine how much interest is earned for each client. The second type of account is a pooled interest-bearing account with the interest to be paid directly by the financial institution to the Legal Foundation of Washington (hereinafter the Foundation), a nonprofit entity to be established pursuant to the order following this opinion. New CPR DR 9-102 (C)(1), (2).

3. Determining whether client funds should be deposited in accounts bearing interest for the benefit of the client or the Foundation is left to the discretion of each lawyer, but the new rule specifies that the lawyer shall base his decision solely on whether the funds could be invested to provide a positive net return to the client. This determination is made by considering several enumerated factors: the amount of interest the funds would earn during the period they are expected to be deposited, the cost of establishing and administering the account, and the capability of financial institutions to calculate and pay interest to individual clients. New CPR DR 9-102(C)(3).

4. A lawyer may, but is not required to, notify his or her clients of the intended use of interest paid to the Foundation. New CPR DR 9-102(C)(1).

5. Lawyers and law firms must direct the depository institution to pay interest or dividends, net of any service charges or fees, to the Foundation, and to send certain regular reports to the Foundation and the lawyer or law firm depositing the funds. New CPR DR 9-102(C)(4).

The Foundation must use all funds received from lawyers' trust accounts for tax-exempt law-related charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, as directed by this court. See Articles of Incorporation and Bylaws of the Legal Foundation of Washington, 100 Wn.2d, Advance Sheet 13, at ii, vi (1984).

The new rule also incorporates the "technical changes" proposed by the Seattle-King County Bar Association. These changes do not affect the substance of the program as published for public comment, but merely make small improvements in ambiguous or redundant wording, help reduce transaction costs, aid in creating

more effective oversight and administration by this court, and bring the program into closer conformity with the current accounting practices of Washington financial institutions.

Opponents argue that the new IOLTA program is unconstitutional, unethical, and would require attorneys to violate their fiduciary duties to their clients. Opponents also argue that the new program would lock us into the current state of banking technology, and that any IOLTA program created should require attorneys to obtain the consent of each individual client before paying over interest on his or her trust funds to the Foundation. Each of these arguments will be addressed in turn.

II

It is contended by the opponents that the new IOLTA program constitutes an unconstitutional taking of property without due process or just compensation in violation of the United States and Washington Constitutions. The primary issue here is whether the interest from nominal or short-term client trust funds constitutes "property" within the meaning of the state or federal constitutions.

Proponents make three arguments in response. They first claim that clients have no "property" right to the interest generated by short-term or nominal trust funds held by their attorneys because such funds are inherently unproductive. Second, they urge the interest on them is either de minimis or illusory since it could not be realistically paid to individual clients once transaction costs and lawyer's fees are taken into account. Third, they claim that the IOLTA proposal would *create* property where none existed before, and giving the client control over whether

his or her money will be permitted to earn interest to be paid to the Foundation would merely constitute a right to compel economic waste, which is not a property right and has no market value for purposes of just compensation. Opponents contend just as strongly that money is property, and that once interest exists it is the property of the person who owns the principal, no matter how small the amount earned might be.

The weight of authority supports the view that interest on nominal or short-term trust deposits is not property. Opponents' argument that the interest is property rests almost entirely on one case, *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 66 L.Ed.2d 358, 101 S. Ct. 446 (1980).[2] In *Webb's*, the purchaser of a corporation's assets tendered over $1.8 million into court in an interpleader action. The payment into court was required by Florida law, which also provided that a percentage fee totaling over $9,000 be charged for the clerk of the court's services in receiving the fund into the registry. In addition, another state statute declared that all interest from money deposited was deemed income of the office of the clerk of the circuit court. *Webb's*, at 156 n.1. After the money had been held by the court for almost a year, and had earned over $90,000 in interest, the court appointed a receiver for one of the parties and paid over the

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[2] Opponents also cite RCW 9A.04.110(21), which defines property for purposes of the criminal code as "anything of value, whether tangible or intangible, real or personal," and RCW 26.16.010, .020, which declare that the rents, issues and profits of one spouse's separate property shall not be subject to the other spouse's debts or control, as support for the proposition that IOLTA interest is property. These statutes provide weak and indirect support for opponents' argument at best.

principal of the fund to him. *Webb's*, at 157-58. The receiver sued to recover the interest earned while the court had possession of the money.

The Supreme Court defined the sole issue in the case as

> whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's services in receiving the fund into the registry.

Webb's, at 155-156.

The United States Supreme Court did not accept the Florida Supreme Court's decision that the interest statute was "constitutional" because interpleaded funds were "considered 'public money,'" the statute "takes only what it creates", and the interest created was not "private property." *Webb's*, at 158-59. Instead, the Court engaged in its own analysis, beginning with the proposition that "Florida's statutes would allow [the county] to exact two tolls while the interpleader fund was held by the clerk of the court." *Webb's*, at 159. The Court then noted that the principal sum deposited in the court registry was private property, that property interests are created by state law, and that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's*, at 161. The Court held that the creditors had much more than an unilateral expectation of receiving the principal of the fund, *Webb's*, at 161, and that the "usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are

ultimately to be the owners of that principal." *Webb's*, at 162. The Court also stated that

> [t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.

Webb's, at 155-56. The Court then stated its holding as follows:

> We hold that under the narrow circumstances of this case – where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others – [the county's] taking unto itself . . . the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.

Webb's, at 164-65.

Although some of the language in *Webb's* supports the broad general proposition that interest is property, when taken in context and in light of the very narrow and expressly limited holding, *Webb's*, we believe, is distinguishable and was not intended to decide the issue now before this court. *Webb's* dealt with an enormous amount of money held over a long period of time that generated tens of thousands of dollars in interest. Even the proponents of IOLTA concede that interest in an amount that could be feasibly and economically distributed to the owner of the principal that generated it is "property." In addition, the controlling factor for the Supreme Court was the fact that two separate levies were imposed by the Florida circuit court. *See Webb's*, at 155-56, 159-60, 162, 164-65. *Webb's* is therefore not applicable to the IOLTA context, which deals only with property rights in small amounts of interest on nominal and short-term trust deposits.

A number of state supreme courts that have expressly considered this question in the IOLTA context have explicitly or implicitly distinguished *Webb's* and held that clients do not have property rights in the interest on nominal, short-term client trust account deposits.

The Florida Supreme Court, for example, dismissed the property right contention in a single paragraph:

> With respect to constitutional concerns regarding the [IOLTA] program, we see none that bars implementation. There are many distinguishing features between the program today implemented for the generation of interest on lawyers' trust accounts, and the legal requirements of state law which led the United States Supreme Court to invoke the fifth amendment "taking" clause for the protection of private property in its *Webb's* decision. The most relevant distinction, plainly, is the fact that no client is compelled to part with "property" by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances. . . It follows that no client has a "property interest," in the constitutional sense, which is being taken from him by this program.[3]

In re Interest on Trust Accounts, 402 So. 2d 389, 395-96 (Fla. 1981). *See also In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258, 1261 (1982), where the New Hampshire Supreme Court agreed with the Florida court's analysis distinguishing *Webb's* and holding that IOLTA interest was not client "property". The Minnesota Supreme Court dealt with this contention even more briefly:

> We do not find that under the circumstances here the client has any "property" that is being taken without compensation or without due process of law under

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[3] The Florida court's holding may be best explained as implicitly based on the ruled that an interest must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for the Fifth Amendment purposes." *Penn Cent. Transp. Co v. New York*, 438 U.S. 104, 125, 57 L.Ed.2d 631, 98 S. Ct. 2646 (1978). Since the client had no reasonable "investment-backed expectation" of benefiting from any interest on his trust funds, *see Penn Central*, at 124, he had no property rights in such interest. This is especially true of corporate clients, which are prohibited from benefiting from NOW accounts under federal banking law. See 12 U.S.C. § 1832(a)(2).

> either the Fifth Amendment of the U.S. Constitution or under Article 1, §§ 13, 7 of the Minnesota Constitution. *See Matter of Interest on Trust Accounts,* 402 So.2d 389 at 395 (Fla. 1981). There simply is no "property" now in existence that would be taken [by the IOLTA program].[4]

In re Minnesota Star Bar Ass'n, 332 N.W.2d. 151, 158 (Minn. 1982). *See also* Minnesota Developments, *Minnesota's New Interest on Lawyer Trust Accounts Program,* 67 Minn. L. Rev. 835, 847-48 (1983); Special Project, *Interest on Lawyer's Trust Accounts: A Proposal for Wisconsin,* 66 Marq. L. Rev. 835, 847-48 (1983). *But cf.* Baker & Wood, *"Taking" a Constitutional Look at the State Bar of Texas Proposal To Collect Interest on Attorney-Client Trust Accounts,* 14 Tex. Tech. L. Rev. 327, 355-61 (1983).

We hold that the interest on short-term or nominal client trust funds of the type that must be invested for the benefit of the Foundation pursuant to the new CPR DR 9-102 does not constitute "property" as defined by the United States or Washington Constitutions. This holding makes it unnecessary to consider whether the IOLTA program requires or permits unconstitutional takings without due process or just compensation.

III

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[4] Neither party cites any Washington case to show that the definition of "property" is different under the Washington Constitution than under the United States Constitution. Proponents imply that the meaning of "property" is the same under both the state and federal constitutions.

Opponents also argue that it is "unethical" for lawyers to use interest from nominal or short-term funds for anything other than the client's benefit. Since this court has amended the Code of Professional Responsibility to *require* lawyer participation in IOLTA, such participation is by definition ethical. We are, nevertheless, concerned with a claim that the program would violate the spirit of the code, and create an appearance of impropriety to laymen.

Since neither this court nor the Washington State Bar Association has previously considered this question, the only real authority is ABA Formal Opinion 348, issued by the ABA Standing Committee on Ethics and Professional Responsibility on July 23, 1982, *reprinted in* 68 A.B.A. J. 1502 (1982).

The ABA Opinion began by holding that "nothing in the model code [of professional responsibility] prohibits a lawyer from placing clients' funds in interest-bearing accounts so long as the other requirements of D.R. 9-102 [virtually identical to Washington's present CPR DR 9-102] are met." 68 A.B.A. J. at 1502.

The committee next held that "the model code does not specify that a lawyer has the duty to invest clients' nominal or short-term funds entrusted to the lawyer." 68 A.B.A. J. at 1503. However, the committee noted that the model code does provide a basis for professional discipline for extreme violations of lawyers' fiduciary duties as trustees, which require that

> where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and the bank charges,

> the lawyer should consult the client and follow the client's instructions as to investing.

68 A.B.A. J. at 1503 (citing CPR DR 6-101(A)(1), CPR DR 6-101(A)(3), and CPR DR 7-101(A)(1)).

Regarding the lawyer's duty once an interest-bearing account is established, the committee made it clear that the full range of duties imposed by the model code applied, but that interest earned on nominal or short-term trust money is to be treated as funds of the tax-exempt organization to which it is paid rather than as funds of the client. 68 A.B.A. J. at 1503. Therefore, in the IOLTA context the duties established by the code are duties that the attorney owes to the Foundation, not the client.

On the ultimate question of whether lawyers may ethically participate in IOLTA programs, the committee considered a program distinguishable from the new Washington program only in that it was optional for attorneys. After reviewing the Florida IOLTA case and relevant IRS rulings, which held that IOLTA interest is not property and does not constitute taxable income to the client, respectively, the committee concluded:

> The model code does not establish whether it is ethically permissible for lawyers to participate in these programs. In the opinion of the committee, however, the rationale for the ethical acceptability of these programs is the same as the premise for acceptability in constitutional law and tax law. The client has no right under the circumstances to require the payment of any interest on the funds to himself or herself because the amount of interest which the funds could earn is likely to be less than the appropriate

> charges for administering the earnings. The practical effect of implementing these programs is to shift a part of the economic benefit from depository institutions to tax-exempt organizations. There is no economic injury to the client. The program creates income where there was none before. For these reasons, the interest is not client funds in the ethical sense any more than the interest is client property in the constitutional sense of client income in the tax law sense. *Therefore, assuming that either a court or a legislature has authorized a program with the attributes described above and thus, either implicitly or explicitly, has made a determination that the interest earned is not the clients' property, participation in the program by lawyers is ethical.*

(Italics ours.) 68 A.B.A. J. at 1504-06. The committee further held that

> The model code also imposes no duty to obtain prior consent or to notify clients of the application of their funds in the programs described above . . . Furthermore, it is ethically proper without the client's consent to allow the application of a portion of the earnings on these funds to reasonable bank charges.

68 A.B.A J. at 1506. *See also In re Minnesota State Bar Ass'n,* 332 N.W.2d 151, 158 (Minn. 1982) (citing the ABA Opinion as support for the "ethical basis" of the Minnesota IOLTA program). We find the reasoning of the ABA Opinion persuasive.

Another concern expressed by opponents is that the IOLTA program will create an appearance of impropriety. They cite no authority or facts to support this assertion. The

only evidence in the briefs on this point is that the two largest newspapers in Washington have published editorials lauding IOLTA. See Seattle Post-Intelligencer, Apr. 16, 1984, at A6; Seattle Times, Dec. 26, 1983. Given the press' role in molding public opinion, these editorials provide at least some evidence that IOLTA would be seen by the public rather than improper.

We believe that the new IOLTA program is consistent with both the spirit and letter of the Code of Professional Responsibility.

IV

Opponents contend that the new IOLTA program would require attorneys to violate their fiduciary duties as trustees in two different ways.

First, they allege that investing client trust money for the benefit of the Foundation, allegedly to satisfy attorneys' ethical obligations to provide legal help to poor Washingtonians, or to provide more work for Washington lawyers, would be self-dealing or the selling of investments to an "affiliated company or association," in violation of RCW 30.24.090.[5] Neither side cites any authority on whether the Foundation is an "affiliated... association" within the meaning of that statute. However, the wording and context of the statute strongly suggest that the statute was only meant to prohibit a trustee or, in the case of a trustee who is an officer or director of a corporation, bank or trust

[5] RCW 30.24.090 provides: "Unless the instrument creating the trust expressly provides to the contrary, any fiduciary in carrying out the obligations of the trust may not buy or sell investments from or to himself or itself or any affiliated or subsidiary company of association."

company, from misusing trust funds for his or her own pecuniary advantage or the advantage of his or her corporation, bank or trust company. Furthermore, the Foundation will be "affiliated" with all Washington lawyers in only the most tenuous nonlegal sense, and it would appear that any additional lawyer "business" that might be created by Foundation expenditures would inure mostly to the benefit of lawyers other than (and not "affiliated" with) those that hold substantial client trust funds. The proposed rule does not permit consideration of general ethical duties to help poor people or the financial plight of lawyers who serve such clients in making investment decisions. *See* new CPR DR 9-102(C)(3).

The opponents' second fiduciary argument alleges that the factors listed in proposed CPR DR 9-102(C)(3), as published for public comment by the court, require attorneys to consider factors other than their clients' best interest in determining whether to invest trust funds for their clients or for the Foundation. If true, the IOLTA program could well conflict with trust law. An attorney who holds money in trust for a client is subject to the same duties as all other trustees to make the money held productive, and only the interests of the *client* (as opposed to the interests of the trustee or a third party) can be considered. *See* 2 A. Scott, *Trusts* § 181 (3d ed. 1967 & Supp. 1983); RCW 30.24.010; *Tucker v. Brown*, 20 Wn.2d 740, 768-69, 150 P.2d 604 (1944). In addressing this issue, the ABA Standing Committee on Ethics and Professional Responsibility stated:

> where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and the bank charges, the

> lawyer should consult the client and follow the client's instructions as to investing.

68 A.B.A. J. at 1503. Proponents answer the opponents' argument by interpreting the proposed CPR DR 9-102-(C)(3) in a manner consistent with trust law:

> Although the proposed amendments list several factors an attorney should consider in deciding how to invest his clients' trust funds, . . . all of these factors are really facets of a single question: Can the client's money be invested so that it will produce a net benefit for the client? If so, the attorney must invest it to earn net interest for the client. Only if the money cannot earn net interest for the client is the money to go into an IOLTA account.

Reply Brief of Proponents, at 14. This is a correct statement of an attorney's duty under trust law, as well as a proper interpretation of the proposed rule as published for public comment. However, in order to make it even clearer that IOLTA funds are only those funds that *cannot, under any circumstances,* earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. *See* new CPR DR 9-102(C)(3). The new rule makes it absolutely clear that the enumerated factors are merely facets of the ultimate question of whether client funds could be invested profitably for the benefit of clients. If they can, then investment for the client is mandatory.

With these changes, we believe that new CPR DR 9-102 is consistent with lawyers' fiduciary obligations as trustees.

V

Opponents argue that the new IOLTA program ignores subaccounting techniques available at some Washington financial institutions that make payment to clients of interest on some short-term or nominal trust funds practicable and cost effective. They also assert that even if such techniques were not available or cost effective now, they probably would be so in the future. Opponents therefore fear that the validity of the IOLTA program is tied to the current level of technology, presumably on the theory that failing to take advantage of new subaccounting techniques as they become available would turn IOLTA participation into an unconstitutional taking of property that could have been distributed to the client.

This argument is without merit, since "[t]he capability of financial institutions to calculate and pay interest to individual clients" is a factor that the new rule expressly directs attorneys to consider in deciding whether to place client trust funds in an IOLTA account of in an account to earn interest for the client. New CPR DR 9-102(C)(3)(c). Thus, as cost effective subaccounting services become available making it possible to earn net interest for clients on increasingly smaller amounts held for increasingly shorter periods of time, more trust money will have to be invested for the clients' benefit under the new rule. The rule is therefore self-adjusting and is adequately designed to accommodate changes in banking technology without running afoul of the state or federal constitutions.

VI

Finally, opponents argue that the IOLTA program should utilize only the interest from trust funds of clients

who expressly consent to their lawyers' participation in the program. We decline to follow this approach. Under the program as adopted, the Internal Revenue Service will consider interest earned on short-term or nominal client trust funds to be income to the tax-exempt Foundation, not to the client. *See* Rev. Rul. 81-209, 1981-2 C.B. 16. If clients could veto the use of their trust money to earn interest for the Foundation, the IRS would almost certainly classify all IOLTA interest as "assigned income" taxable to the clients, even when the Foundation was the actual recipient of the interest. *In re Interest on Trust Accounts*, 402 So. 2d 389, 390-91 (Fla 1981); *see* Rev. Rul. 81-209, *supra*. Such a result would make the IOLTA program impracticable.

VII

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the Washington State Bar Association shall incorporate and establish the Legal Foundation of Washington under the Articles of Incorporation and Bylaws published by this court at 100 Wn.2d, Advance Sheet 13, at i (1984), and that such action shall be accomplished no later than January 1, 1985;

2. That effective January 1, 1985, the new CPR DR 9-102 of the Code of Professional Responsibility is adopted as follows:

[Published at 101 Wn.2d 1242]

Dated at Olympia, Washington, this 19th day of June, 1984.